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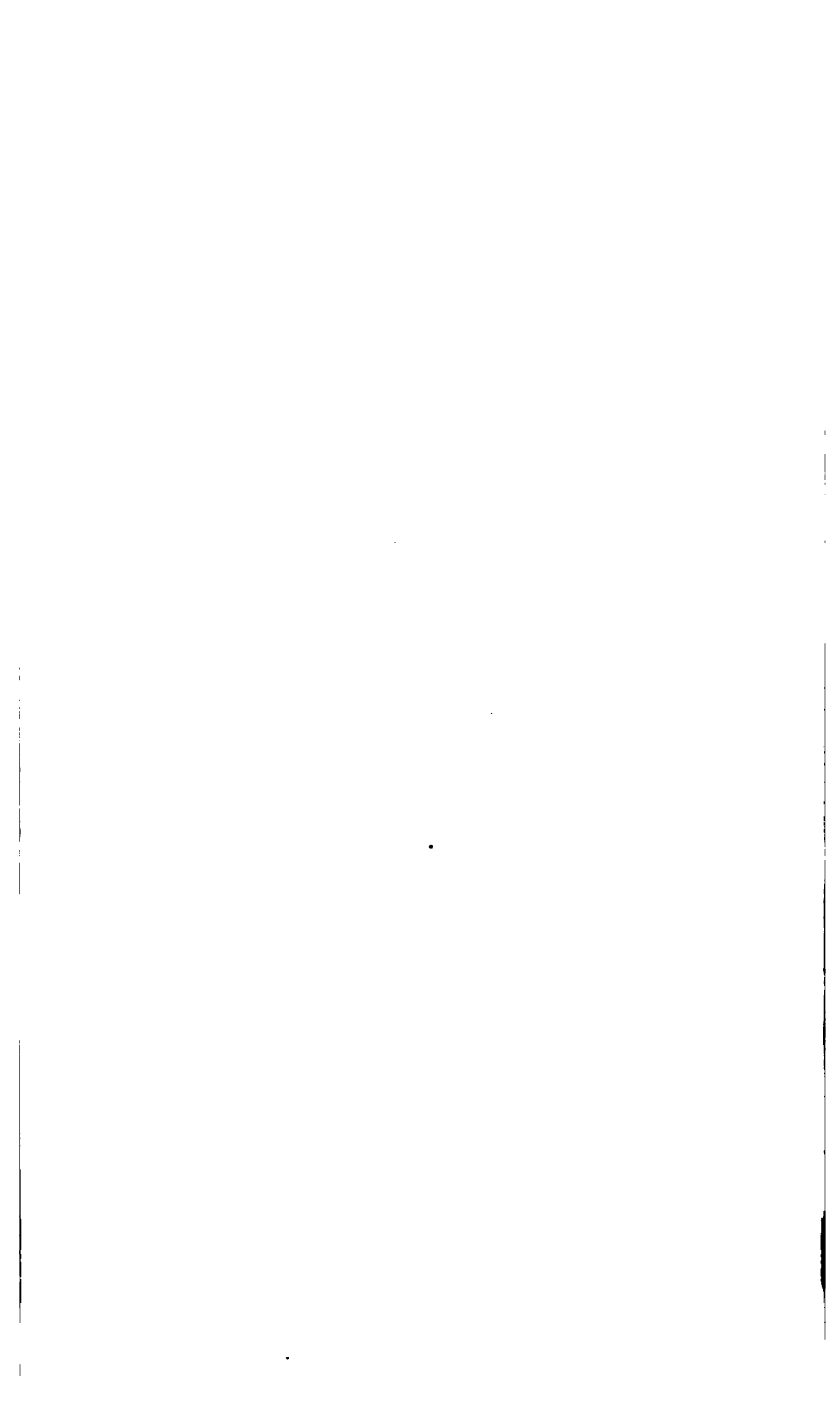
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# REPORTS OF CASES

ADJUDGED IN THE

# HIGH COURT OF CHANCERY,

BEFORE THE

RIGHT HON. SIR GEORGE JAMES TURNER.

AND

SIR WILLIAM PAGE WOOD,

VICE-CHANCELLORS.



By THOMAS HARE,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.



VOL. X.

1852 TO 1853:—15 AND 16 VICTORIÆ.



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LORD ST. LEONARDS, }  
 LORD CRANWORTH. } *Lord Chancellors.*

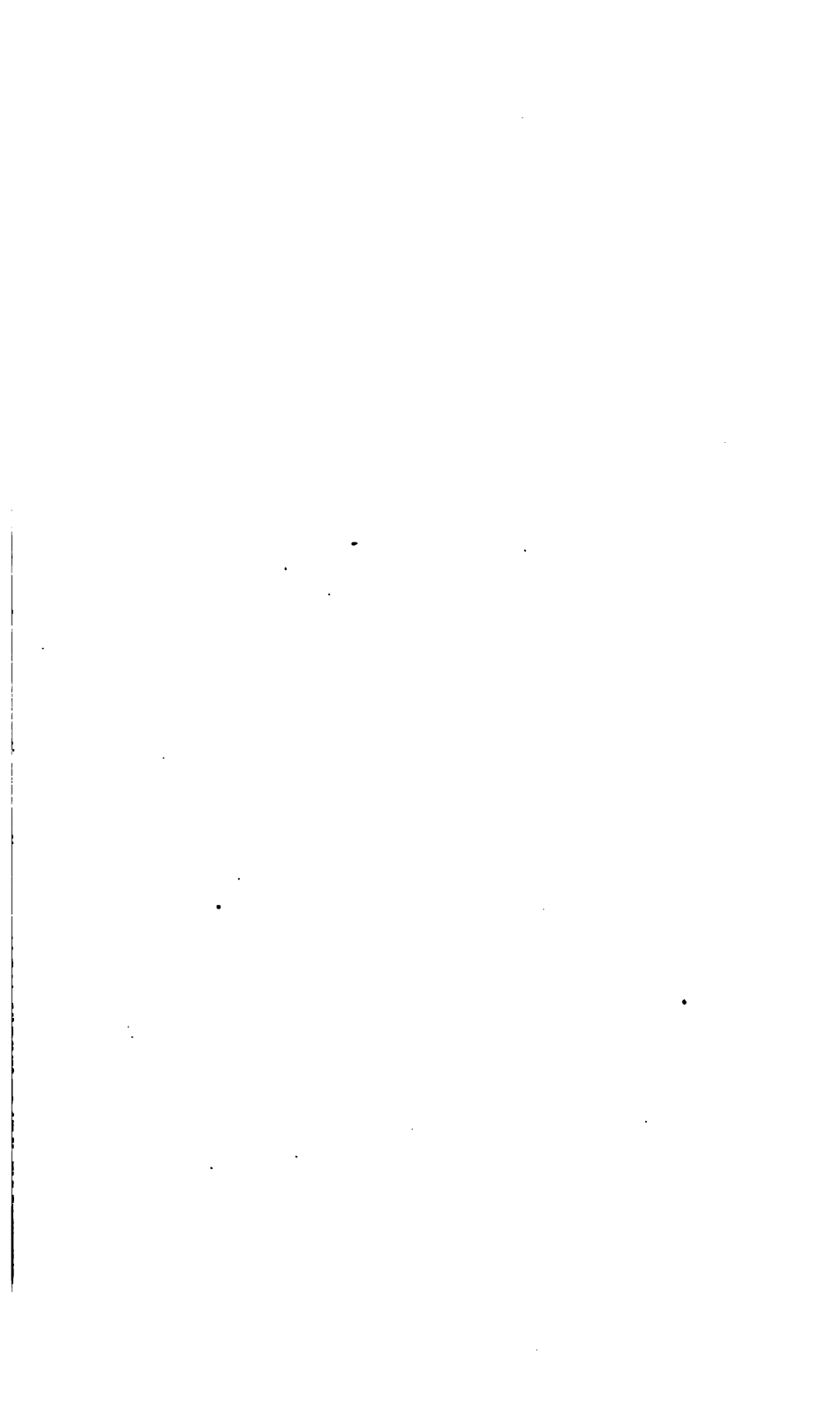
LORD CRANWORTH, }  
 SIR JAMES LEWIS KNIGHT BRUCE, } }  
 SIR JAMES LEWIS KNIGHT BRUCE, } } *Lords Justices.*  
 SIR GEORGE JAMES TURNER, . } }

SIR JOHN ROMILLY, *Master of the Rolls.*

SIR GEORGE JAMES TURNER . . . . . }  
 SIR RICHARD TORIN KINDERSLEY, } }  
 SIR JOHN STUART, . . . . . } } *Vice-Chancellors.*  
 SIR RICHARD TORIN KINDERSLEY, } }  
 SIR JOHN STUART, } }  
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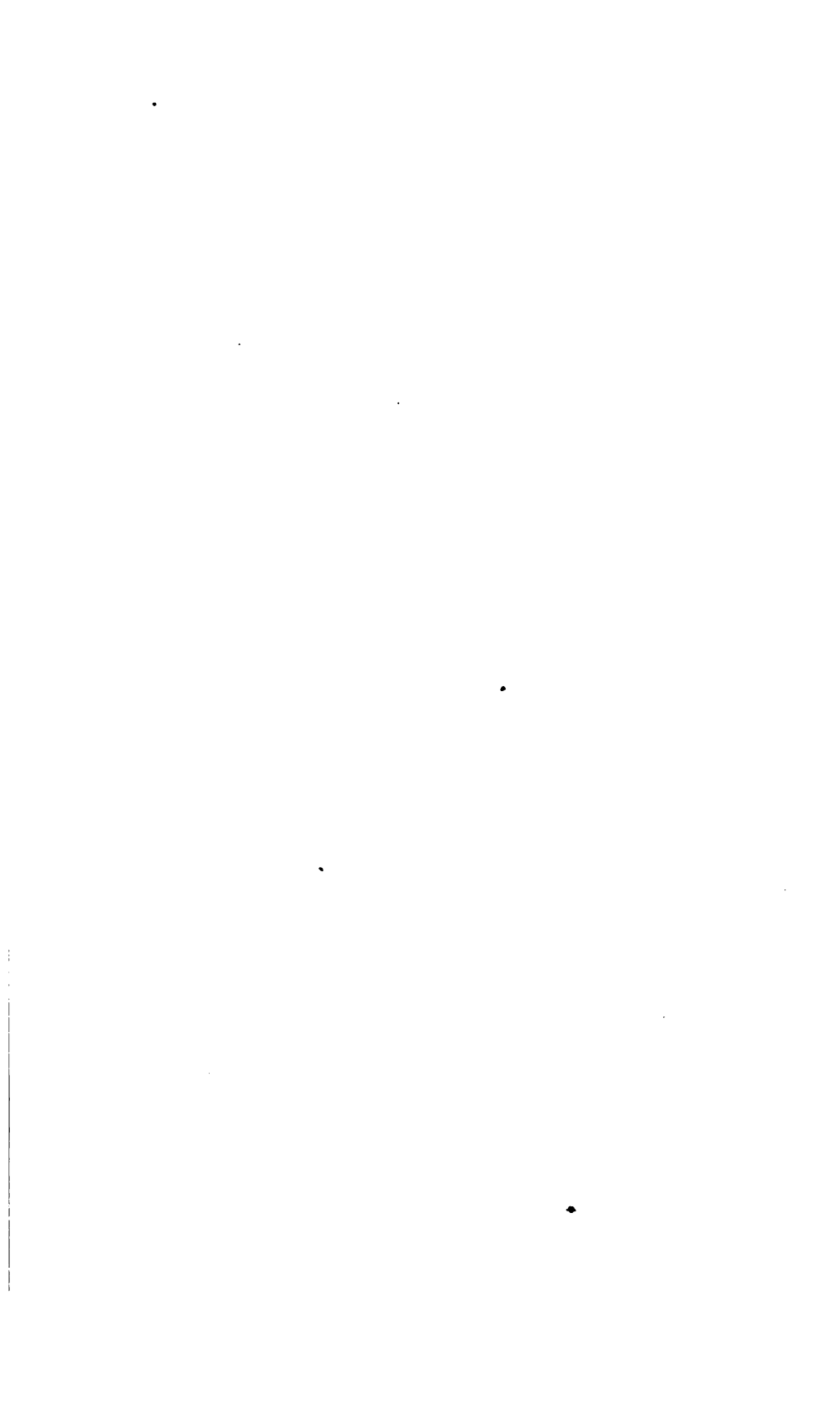
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# REPORTS OF CASES

ADJUDGED IN THE

## High Court of Chancery,

BEFORE

THE RIGHT HON. SIR GEORGE JAMES TURNER, KNT.,  
VICE-CHANCELLOR.

COMMENCING IN

TRINITY TERM, 15 VICT., 1852.

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### PYRKE v. WADDINGHAM.

1852.

March 17<sup>th</sup>  
& 18<sup>th</sup>,  
June 29<sup>th</sup>.

**A** VENDOR'S bill for specific performance. The title was derived under the will of *Thomas Pyrke*, dated the 27<sup>th</sup> of February, 1752, which, after directing his debts and funeral expenses to be paid within a year after his decease, providing for the confirmation of leases which he had made of parts of his *Notgrove* estate, bequeathing

On a vendor's bill for specific performance, the opinion of the Court was much in favour of the title, the question on which turned on the construction of a particular

particular will; but the Court, being unable to found that opinion upon any general rule of law, or upon reasoning so conclusive as to satisfy the Court that other competent persons might not entertain a different opinion, or that the purchaser taking the title might not be exposed to substantial and not merely idle litigation, refused to decree a specific performance.

A doubtful title, which a purchaser will not be compelled to accept, is not only a title upon which the Court entertains doubts, but includes also a title which, although the Court has a favourable opinion of it, yet may reasonably and fairly be questioned in the opinion of other competent persons; for the Court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion in favour of the title should turn out not to be well founded.

If the doubts as to a title arise upon a question connected with the general law, the Court is to judge whether the general law on the point is or is not settled; and if it be not, or if the doubts as to the title may be affected by extrinsic circumstances, which neither the purchaser nor the Court can satisfactorily investigate, specific performance will be refused.

The rule rests upon the principle that every purchaser is entitled to require a marketable title.

It is the duty of the Court, on questions of title depending on the possibility of future rights arising, to consider the course which would be taken if the rights had actually arisen, and were in course of litigation.

1852.  
 PYRKE  
 v.  
 WADDING-  
 HAM.  
 Statement.

some legacies, and giving to *Priscilla Bromwich* 40*l.* a year for her life, to be paid out of his estate quarterly after his wife's death, but not before, he proceeded: "I give to my dear wife *Dorothy*, who I appoint executrix of this my last will and testament, all my manors, lands, tenements, goods and chattels, and stock of what nature soever, with all my ready money, and the interest of all securities for money, for the term of her natural life; and when she dies, her funeral expenses to be paid by my heir according to such directions as she shall give before her death or leave behind her in writing." "I give (after my wife's death) all my manors, lands, tenements, and interest of all my money and securities for money—I mean only the interest of them—and chattels, to my nephew *Joseph Watts*, for his life, with liberty to make a jointure of any part of the estate, and also to make leases of any part thereof not exceeding twenty-one years, reserving the best rent he can get for the same premises so leased, and having all usual covenants inserted in such leases on the lessees' part to be done and performed, and such lessee or lessees executing counterparts of such leases; and if the said *Joseph Watts* shall die, and leave one or more son or sons, I give my said estate to his eldest and every other sons, the eldest to take place before the younger, according to their priority of birth. If the said *James Watts* should happen to die and leave no son, but only one or more daughters, I give him power to charge the estate with 5000*l.*, and no more, for their provision; and if the said *Joseph Watts* shall die and leave no son, then I give my estates to *Robert Pyrke*, son of the late Rev. *William Pyrke*, and nephew to Mrs. *Collier*, upon the same terms and conditions as I gave it to *Joseph Watts*. And if the said *Robert Pyrke* shall die and leave no son, but shall leave one or more daughters, I give him leave to raise 4000*l.* out of the estate for their provision. I then give my said estate and estates to the first, second,



and other sons of the late Mr. *John Skippe*, upon the same conditions as before mentioned to *Joseph Watts* and *Robert Pyrke*; and in case all those sons shall die without issue male, then I give my said estates to the eldest and every other son and sons of Mr. *George Skippe* successively, and their heirs, for ever, paying to their brother *Thomas Skippe* 500*l.*, and to their sister *Kitty* the same sum. When I mention sons, I mean those which are lawfully begotten. It is my intent and meaning, and I do hereby order and appoint, that, in case any of the person or persons to whom I have given my said estate under the limitations aforesaid, shall be under the age of twenty-four years when they have a right to the estate, that then the rents and profits of my estates shall be received by Mrs. *Whitchurch*, the Rev. Mr. *Yate*, and Mr. *John Robinson*, who I appoint trustees of this my will, in trust, that they shall apply a reasonable part of such rents for the maintenance and education of such person as shall have a right to the estate, but under the age of twenty-four years, namely, not exceeding 50*l.* a year till they are at the age of twenty-one years, and 100*l.* a year until they are of twenty-four years of age. I give to my trustees 20*l.* each. I also order and appoint, that, after deducting all necessary expenses belonging to their trust, my trustees shall put out to interest money that shall be due for rent or on my securities, till *Joseph Watts*, or any other person entitled, shall attain the age of four-and-twenty years; and if *Joseph Watts* attains that age, that then he shall have possession of all my estates and securities for money, after he has discharged all legacies and payments ordered by this my will to be paid and discharged upon the conditions aforesaid. I also order, that if the said *J. Watts*, or any of the *Skippes*, shall be entitled to the estate by this my will, that they should change their names to that of *Pyrke* within two years, otherwise the estate shall go to the person next entitled to it."

1852.  
 PYRKE  
 v.  
 WADDING-  
 HAM.  
 Statement.

1852.  
 PYRKE  
 v.  
 WADDING-  
 HAM.  
 Statement.

The testator then gave directions as to the bringing up of *Joseph Watts* to the profession of the law, if his wife should live until he should be fit to leave school; and directed, that, after his wife's death, the person entitled to his estate, or his trustees, should lay out 70*l*. for a monument, to be erected in the church of Little Dean, in memory of himself, his wife, and children.

The testator died the 7th of March, 1752, leaving *Dorothy*, his widow, and *Joseph Watts*, his great nephew and heir-at-law. The widow died in 1762; *Joseph Watts* attained twenty-four in 1764, and then entered into possession of the devised estates, and took the name of *Pyrke*. *Joseph Pyrke* (distinguished as the elder), on his marriage in 1766, conveyed the devised estate to uses in favour of himself for life, with remainder to *Charlotte*, his wife, for life, with divers remainders over. By a feoffment, and a fine levied in 1798, a conveyance of the estate was made to the use of *Joseph Pyrke* the elder, in fee; and a recovery, suffered in the same year, in which *Joseph Pyrke* the younger, the eldest son and afterwards the heir of *Joseph Pyrke* the elder, was vouchee, was declared to enure to the use of *Joseph Pyrke* the elder, in fee. *Joseph Pyrke* the elder died in 1803, having, by will, devised the estate to *Charlotte* his wife for her life, with remainder to his son *Joseph Pyrke* the younger, in fee; and leaving also five younger sons. A recovery suffered of the estate, in 1806, was declared to enure, in the first place, to confirm the life estate of *Charlotte*, the widow; and, subject thereto, to the use of *Joseph Pyrke* the younger, in fee. By a deed, dated in February, 1806, the younger sons of *Joseph Pyrke* the elder released to *Joseph Pyrke* the younger all remainders and other estates, interests, or claims, under the wills of *Thomas Pyrke* the testator, *Dorothy* his widow, or *Joseph Pyrke* the elder. *Charlotte*, the widow, died in 1835. *Joseph Pyrke* the younger died in 1851, having,

by his will and codicil, devised his estates to the Plaintiff, his son, in fee.

The Plaintiff contracted to sell the *Notgrove* estate to the Defendant, and the present bill was filed for specific performance of the contract. The purchaser by his answer insisted, that, according to the true construction of the will of *Thomas Pyrke*, the devise was to *Joseph Watts*, for his life, with remainder to his first and other sons successively, with certain vested remainders over, upon the death of the survivor of such sons, three of whom were still living.

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 PYRKE  
 v.  
 WADDING-  
 HAM.  
 Statement.

At the hearing,

Sir *W. P. Wood*, Mr. *Baile*, and Mr. *Bevir*, for the Plaintiffs, argued, that any construction which gave to *Joseph Pyrke* the elder, or to any of his sons, an estate of inheritance, whether in fee or in tail, would give the Plaintiff a good title; and that any construction which led to an intestacy, by which the estate would be undisposed of at the decease of the Plaintiff, would also give the Plaintiff a good title, as taking under the heir-at-law of the testator: *Robinson v. Robinson* (a), *Mellish v. Mellish* (b), *Chorlton v. Craven* (c), *Doe d. Garrod v. Garrod* (d), *Doe d. Jones v. Davies* (e), *Clonmert v. Whitaker* (f), *Doe d. Nesmyth v. Knowls* (g), *Doe d. Burrin v. Charlton* (h), *Raggett v. Beaty* (i), *Shulldham v. Smith* (k).

Argument.

Mr. *Rolt*, Mr. *C. Barber*, and Mr. *Eddis*, for the Defendant, submitted, that the will gave an estate for life to

- (a) 2 Ves. 225; *S. C.*, 1 Burr. 38; 3 Bro. P. C. 180.
- (b) 2 B. & C. 520.
- (c) Cited *Id.* 524.
- (d) 2 B. & Ad. 87.
- (e) 4 B. & Ad. 43.

- (f) 2 Jarm., Wills, 373.
- (g) 1 B. & Ad. 324.
- (h) 1 Man. & Gr. 429.
- (i) 2 M. & P. 512.
- (k) 6 Dowl. 22.

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 }  
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 —  
*Argument.*

*Joseph Pyrke* the elder, with remainder to his sons in succession for life, and vested remainders over. The word estate did not describe the interest, but the land. The leaning of the Court was always in favour of the vesting rather than of the contingency of remainders.—They cited *Doe d. Comberbach v. Perryn* (a), *Ives v. Legge* (b), *Barnacle v. Nightingale* (c), *Evans v. Astley* (d), *Earl of Scarborough v. Savile* (e), *Doe d. Lean v. Lean* (f), *Doe d. Jearrad v. Bannister* (g), *Baker v. Tucker* (h). And they contended also, that, whatever the better construction of the will might be, still the case was one of so much doubt, that the Court would not enforce specific performance of the contract. On this point, several of the cases mentioned in the judgment were referred to, both in the argument for the Defendant and in the reply, as was also the Treatise of the Law of Real Property as administered by the House of Lords, p. 257.

*June 29th.*  
 —  
*Judgment.*

VICE-CHANCELLOR:—

The bill in this case is filed by a vendor against a purchaser, for specific performance; and the question in the cause is, whether the vendor has shewn such a title as the Court will compel the purchaser to accept.

It is not disputed, that the vendor has shewn a good title, if, upon the true construction of the will of *Thomas Pyrke*, the testator, it is clear either that *Joseph Watts*, who, after the death of the testator, assumed the name of *Pyrke*, and became *Joseph Pyrke* the elder, took an estate tail in possession, or even in remainder expectant upon the estates given to his sons; or that the sons of *Joseph*

- (a) 3 T. R. 484.
- (b) 3 T. R. 488, n.
- (c) 14 Sim. 456.
- (d) 3 Burr. 1570.

- (e) 3 A. & E. 897.
- (f) 1 Q. B. 229.
- (g) 7 M. & W. 292.
- (h) 3 H. L. Cas. 106.

*Pyrke* the elder, who had several sons, some of whom are yet living, took estates either in tail or in fee; or lastly, that the remainders in favour of *Robert Pyrke* and the *Skippes* are contingent, and not vested remainders: but the title of the vendor is questioned upon all these points.

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 PYRKE  
 v.  
 WADDING-  
 HAM.  
 Judgment.

It has now for so long a time been the settled rule of Courts of equity not to compel a purchaser to accept a doubtful title, that it is quite unnecessary for me to make any observations upon that subject; but, in considering this case, I have found it necessary to look into the question, what titles are to be considered as doubtful within the meaning of this rule. Whether the rule applies only in those cases in which the Court itself entertains doubts upon the title, or whether it extends further to cases in which, although the Court itself may entertain an opinion in favour of the title, it is satisfied that that opinion may fairly and reasonably be questioned by other competent persons. I have, therefore, examined the cases upon this point; and, upon examining them, I do not think that the question is open to much doubt; for in *Marlow v. Smith* (a), one of the earliest, and in *Price v. Strange* (b), one of the latest cases on the subject, there are distinct opinions upon the question. In *Marlow v. Smith*, the then Master of the Rolls not merely expresses his own opinion against the title, but adds, and "there being the opinion of learned men against the title, I will not, nor do I think it reasonable that a Court of equity should, compel the purchaser to accept the purchase;" and in *Price v. Strange*, Sir John Leach, though he expressed his opinion in favour of the title, declined to compel the purchaser to accept it.

There is also the case of *Rose v. Calland* (c), in which I find the Lord Chancellor saying "I should be in a strange

(a) 2 P. Wms. 198. (b) 6 Madd. 159, 164. (c) 5 Ves. 186.

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 }  
 PYRKE  
 v.  
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 HAM.  
 —  
*Judgment.*

A marketable title is a title which, at all times, and under all circumstances, may be forced upon an unwilling purchaser.

situation in desiring a purchaser to take this title, because I think the point a good one, though the Court of Exchequer have determined against it. It is telling him to try my opinion at his expense (a).” And these dicta and decisions seem to accord with the principle on which the rule appears to be founded; for it may be collected from what fell both from Lord *Eldon* and Lord *Redesdale* in *Blosse v. Lord Clanmorris* (b), and afterwards from Lord *Eldon* in *Lord Braybrooke v. Inskip* (c), that the rule rests upon this, that every purchaser is entitled to require a marketable title; by which I understand to be meant, a title which, so far as its antecedents are concerned, may at all times, and under all circumstances, be forced upon an unwilling purchaser. I think, therefore, that in these cases it is the duty of the Court not to have regard to its own opinion only, but to take into account what the opinion of other competent persons may be; and that this is the true rule to be applied in such cases, is, I think, the more apparent, from the repeated decisions that the Court will not compel a purchaser to take a title which will expose him to litigation or hazard, of which *Cooper v. Denne* (d), *Crewe v. Dicken* (e), *Roake v. Kidd* (f), *Sharp v. Adcock* (g), and *Price v. Strange* (h), may be mentioned as instances.

Such, then, being the rule by which the Court is to be guided in enforcing or refusing to enforce specific performance in cases of this nature, it may well be asked by what scale are the doubts which may be entertained upon the title to be measured; and the cases, I think, throw some light upon this question also. If the doubts arise upon a question connected with the general law, the Court is to

(a) 5 Ves. 188.

(b) 3 Bligh, 62, 71.

(c) 8 Ves. 417.

(d) 4 B. C. C. 80.

(e) 4 Ves. 97.

(f) 5 Ves. 647.

(g) 4 Russ. 374.

(h) 6 Madd. 159.

judge whether the general law upon the point is or is not settled, enforcing specific performance in the one case, as in *Moody v. Walters* (a) and *Biscoe v. Perkins* (b); and refusing to enforce it in the other, as in *Blosse v. Lord Clanmorris* (c) and *Sloper v. Fish* (d). If the doubts arise upon the construction of particular instruments, and the Court is itself doubtful upon the points, specific performance must of course be refused, as in *Sheffield v. Lord Mulgrave* (e), *Willcox v. Bellaers* (f), and *Jervoise v. The Duke of Northumberland* (g), the doctrine in which case has been followed by the Vice-Chancellor *Knight Bruce* in *The Earl of Lincoln v. Arcedeckne* (h); and even though the Court may lean in favour of the title, its duty is either, as expressed by Lord *Eldon* in *Jervoise v. The Duke of Northumberland*, following in effect what had been said in *Sheffield v. Lord Mulgrave*, to consider whether it would trust its own money upon the title, or, at least, as stated by the same learned Judge in *Lord Braybrooke v. Inskip* (i), with reference to the doubt upon the legitimacy, to weigh whether the doubt is so reasonable and fair that the property would be left in the purchaser's hands not marketable. If the doubts which arise may be affected by extrinsic circumstances, which neither the purchaser nor the Court has the means of satisfactorily investigating, specific performance is to be refused, according to *Lowes v. Lush* (k), *Hartley v. Smith* (l), and *Smith v. Death* (m).

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 Judgment.

It may be thought, perhaps, that, if the Court is of opinion in favour of the title, a specific performance ought necessarily to be decreed; and the cases of *Rushton v. Cra-*

(a) 16 Ves. 283, 312.  
 (b) 1 V. & B. 485, 493.  
 (c) 3 Bligh, 62.  
 (d) 2 V. & B. 145.  
 (e) 2 Ves. jun. 526, 529.  
 (f) 1 T. & R. 491, 495.

(g) 1 J. & W. 559, 569.  
 (h) 1 Coll. 98.  
 (i) 8 Ves. 428.  
 (k) 14 Ves. 547.  
 (l) Buck's B. Cas. 368.  
 (m) 5 Madd. 371, 372.

1852.  
 PYRKE  
 v.  
 WADDING-  
 HAM.  
 Judgment.

*ven* (a) and of *Chorlton v. Craven* (b), mentioned in it, were cited in support of that position, as was also *Clonmert v. Whitaker* (c); but in those cases the opinion of the Court had been fortified by the opinion of a Court of law; and, looking at the other cases to which I have referred, I cannot venture to hold, that, because this Court is of opinion in favour of the title, a purchaser is to be compelled to accept it. I think that each case must depend upon the nature of the objection, and the weight which the Court may be disposed to attach to it; and that, in determining whether specific performance is to be enforced or not, it must not be lost sight of, that the exercise by the Court of its jurisdiction in cases of specific performance, is discretionary; and that, as was observed in *Cooper v. Denne*, and *Sheffield v. Lord Mulgrave*, the Court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion should ultimately turn out not to be well founded.

It remains for me only to apply these principles to the present case.

The question upon this title depends, I think, principally, if not wholly, upon the construction of this particular will, and not upon any general rule of law. I have fully considered the questions, and the authorities which were referred to in the argument. My opinion, I do not hesitate to say, is much in favour of the title, more especially upon the point as to the remainders being contingent; but I find myself unable to base that opinion upon any general rule of law, or upon any reasoning so conclusive as fully to satisfy my mind, that other competent persons may not entertain a different opinion, or that the purchaser, if compelled to take the title, might not be exposed to substantial and not merely idle litigation, or even that he would be free from

(a) 12 Price, 509.

(b) Cited Id. 619.

(c) 2 Jarm., Wills, 373.



all possible hazard. Upon these grounds, therefore, I am of opinion, that a specific performance ought not in this case to be decreed; and I am the more strongly of that opinion, because I think, that, in cases of this nature, where titles may be affected by rights which may hereafter arise, it is the duty of the Court to consider how it would act if those rights had actually arisen, and were in the course of active litigation; and I am satisfied, that, if the questions which may arise upon this title were now in active litigation between the Plaintiff and adverse claimants, I should not feel myself justified in disregarding that litigation, and decreeing a specific performance during its pendency.

It was pressed in argument, that, if I should arrive at this conclusion, a case might be directed; but, the Defendant objecting to that course, the Plaintiff has no right to insist upon a case. The Court refused to send a case both in *Rooke v. Kidd*, in *Willcox v. Bellaers*, and in *Sharp v. Adcock*; and in *Sheffield v. Lord Mulgrave*, where a case had been directed, the Court refused to act upon the certificate against the purchaser. I take the rule of the Court upon this subject to be, that it will not, against a purchaser, send a case upon a doubtful question of law, any more than it will direct an inquiry upon a doubtful question of fact, and for the same reason, that adverse claimants would not be bound by the result.

The conclusion, therefore, at which I have arrived is, that this bill must be dismissed. I repeat, that I dismiss it, not from any opinion against the title,—my opinion being in favour of it,—but upon the grounds which I have stated. The bill being dismissed, I must give the Defendant the costs. The case of *Blosse v. Clanmorris* is, I think, decisive upon that point.

1852.  
 PRYKE  
 v.  
 WADDING-  
 HAM.  
 Judgment.

1852.

June 11th &  
25th.

A woman, joint tenant of a reversionary interest in a legacy of 2000*l.* stock, married; and, after the marriage, the husband became bankrupt, and then the wife died, leaving the tenant for life of the fund surviving:—*Held*, that, by the death of the wife, the other joint tenants of the fund became entitled to her interest therein by survivorship; that that was the elder title to that of the husband, which also accrued after the death of the wife; and that, upon the death of the tenant for life, the other joint tenants, and not the assignees of the husband, were entitled to what had been the wife's share of the fund.

IN THE MATTER OF THE TRUSTS OF THE WILL OF  
NEWTON BARTON.

**N.** *BARTON*, formerly of *New College, Oxford*, by his will, dated in 1808, bequeathed to *Mrs. Barton*, his mother, widow, the residue of his property for her life, and after her decease 2000*l.* to *Frederick Ekins*; in case of his decease before that of *Mrs. Barton*, the same to his children. *Frederick Ekins* died in 1842, in the lifetime of *Mrs. Barton*, leaving four children; one of whom, *Caroline Isabella*, in February, 1844, married *J. L. Loraine*. In July, 1844, *J. L. Loraine* became bankrupt. In February, 1847, *Caroline Isabella* died. *Mrs. Barton* died in May, 1849.

The trustees of the fund in 1851 paid into Court 500*l.*, being one fourth of the 2000*l.*, together with the dividends received on the one fourth after the decease of *Mrs. Barton*. The three children of *Frederick Ekins* (other than *Caroline Isabella Loraine*) presented their petition for payment of one third of the fund out of Court to each of them.

*Mr. Campbell* and *Mr. Druce* for the petitioners.—The wife's reversionary interest in a personal chattel, not reduced into possession during the coverture, does not pass to the husband's assignees by the assignment in bankruptcy as against the surviving wife: *Saddington v. Kinsman* (a), *Mitford v. Mitford* (b), *Gayer v. Wilkinson* (c). There had been no severance of the joint tenancy, and the fund therefore belonged to the three survivors: *Pierce v. Thornely* (d), *Ashby v. Ashby* (e), *Borton v. Borton* (f), *Ellison v. Elwin* (g), *Le Vasseur v. Scrutton* (h), *Osborn v. Morgan* (i).

(a) 1 Bro. C. C. 44.

(d) 2 Sim. 167.

(g) 13 Sim. 309.

(b) 9 Ves. 87.

(e) 1 Coll. 553.

(h) 14 Sim. 116.

(c) 1 Bro. C. C. 50, n.

(f) 16 Sim. 552.

(i) 9 Hare, 432.

Mr. *Faber* for the husband.

Mr. *Bacon*, for the assignees, contended that there had been a severance of the joint tenancy. The marriage introduced a fifth person in interest (2 Cruise, Dig., tit. 18, pt. 12); and which interest, or possibility of interest, passed to the assignee on his bankruptcy. This amounted to an effectual severance of the joint tenancy. It would be a strange proposition to say, that a married woman, a joint tenant of a reversion, has it not in her power to sever the joint tenancy, whatever the necessities of her family might be, or however important it might become to avert the danger of the children being deprived of the mother's interest in case of her death.

*Ripley v. Woods* (a) and *Brown v. Raindle* (b) were also mentioned.

1852.  
Is re  
TRUSTS OF  
BARTON'S  
WILL.  
Argument.

VICE-CHANCELLOR:—

I have taken occasion, since the case was opened, to look into the authorities on this singular case, and they appear to me to be decisive of the question. The four children of *Frederick Ekin* took the legacy of 2000*l.* as joint tenants; and the first question is, what is the effect of the marriage of Mrs. *Loraine* on the joint tenancy of her and the other children. There is a passage in *Coke's Commentary* upon *Littleton*, which appears to me to have a material bearing on this case. The passage I refer to is this: "Two femes, joint tenants of a lease for years: one of them taketh husband, and dieth, yet the term shall survive; for though all chattels real are given to the husband, if he survive, yet the survivor between the joint tenants is the elder title, and after the marriage the feme continued sole possessed; for if the husband dieth, the feme shall have it, and not the executors of the husband. But

Judgment.

(a) 2 Sim. 165.

(b) 3 Ves. 256.

1852.

*In re*  
TRUSTS OF  
BARTON'S  
WILL.

*Judgment.*

otherwise it is of personal goods" (a). The authority referred to by Lord *Coke* is the case of *Bracebridge v. Cooke* (b). In that case, after stating, that, if a woman having a term of years takes a husband, the husband cannot devise the term to another by his will; for the wife, at the time of the death, and before the death, had the estate in her, which will prevent and frustrate the devise; and if the husband had in his life granted a rent-charge out of the term, the wife surviving should avoid the charge, and all other incumbrances, for she surviving is remitted to the term, of which she is not divested by the coverture—it is said: but otherwise it is of chattels personal; for if a woman who has personal goods takes a husband, the law divests the property out of the wife and vests it in the husband only; and so it is if a stranger gives personal goods to a feme covert and to a stranger, the jointure is presently severed by the law, so that the survivor of the wife or of the other shall not have the whole, but the husband and the other are tenants in common presently, and the title of such of them as first dies shall go to the executors; for chattels personal are esteemed in law of less value and are of a baser degree than chattels real, and so there is a diversity between them: and it is added, that the case being one of a chattel real, the coverture of the wife makes no severance of the jointure, nor is it any impediment to the Plaintiff having the whole as survivor. And then the report proceeds on the other points of the case. Thus it appears, that, in the case of chattels real, the joint tenancy is not severed by the marriage, because the property does not vest in the husband; but in the case of chattels personal, it is severed by the marriage, because the property does vest in her.

Now, in the present case, the property was a mere chattel personal, but the wife's interest was reversionary; and,

(a) Co. Litt. 185. b.

(b) Plowd. 417.

therefore, the title of the husband or his assignees could not arise till after the death of the wife in his lifetime. The case, therefore, seems to me to fall within the principle of the rule which applies to chattels real, and not of the rule which applies to chattels personal; and, consequently, the joint tenancy was not severed by the marriage, but continued till the death of the wife.

1852.  
Is re  
TRUSTS OF  
BARTON'S  
WILL.  
Judgment.

The case is then brought to the simple point, whether, upon the death of the wife, the right of the husband or that of the other joint tenants first attached; and this question is, I think, decided by a distinction which I find taken in the same page of *Coke Littleton*, from which I have already quoted: *Littleton*, having stated that a devise by one joint tenant shall not prevail against the surviving joint tenant, says, "And the cause is, for that no devise can take effect until after the death (post mortem) of the devisor; and, by his death (per mortem), all the land presently cometh by the law to his companion (a)." "Here," says Lord *Coke*, "both their claims commence at one instant, and although an instant est unum indivisibile tempore, quod non est tempus nec pars temporis, ad quod tamen partes temporis connectuntur; and that instans est finis unius temporis et principium alterius, yet in consideration of law, there is a priority of time in an instant, as here the survivor is preferred before the devise; for *Littleton* saith, that the cause is, that no devise can take effect till after the death of the devisor, and by his death all the land presently cometh by the law to his companion; whereby it appeareth, that *Littleton*, by these words 'post mortem et per mortem,' though they jump at one instant, yet alloweth priority of time in the instant, which he distinguisheth by per and post; and the reason of this priority is, that the survivor claimeth by the first feoffor

(a) Sect. 287.

1862.

*In re*  
TRUSTS OF  
BARTON'S  
WILL.  
—  
*Judgment.*

(as hath been said), and therefore, in judgment of law, his title is paramount to the title of the devisee(a)."

Putting, therefore, the present case on the narrow question, whether the survivorship took effect in favour of the husband or in favour of the surviving joint tenants, I think the distinction which is thus taken is decisive of that question; and the authorities being in favour of the older title, where two titles of different dates come into possession at the same moment, I must hold, that the joint tenants and not the husband or his assignees are entitled.

(a) Co. Litt. 185. b.

*June 25th.*

#### IN THE MATTER OF DODSWORTH'S TRUST.

Investment of  
a fund be-  
longing to a lu-  
natic in an an-  
nuity for his  
life.

THE surviving executor of a testator paid into Court a legacy of 4000*l.*, bequeathed to *Ann Middleton* for her life, and after her decease to her children equally. *Ann Middleton* was dead, and the children presented their petition for payment of their respective shares of the fund. *Charles Middleton*, one of the children, was stated by the affidavits to have been an idiot from his birth. His share of the fund was 519*l.* 9*s.* 4*d.* Reduced Annuities, which were carried to his separate account. A petition was now presented, praying that the 519*l.* 9*s.* 4*d.* Stock, might be sold and invested in the purchase of a Government annuity for the life of *Charles Middleton*, who was of the age of forty-nine, whereby it was stated that his income would be increased from 14*l.* to 30*l.*, or thereabouts.

*Argument.*  
—

Mr. *Fooks*, for the petition, referred to three cases mentioned by Mr. Shelford in his Treatise of the Law of Luna-

tics, &c., p. 272, 2nd edition (a), and also to the case of *Ex parte Stonard* (b).

1852.

*In re*  
DODSWORTH'S  
TRUST.

The VICE-CHANCELLOR said, he should have no difficulty in following these authorities.

Let it be referred to the Taxing Master to tax the petitioners their costs, charges, and expenses of and relating to this application, and consequent thereon; and let so much of 519*l.* 9*s.* 4*d.* Reduced Annuities, standing in the name of the Accountant-General of this Court, in trust in the matter of the trusts of the will of *Joseph Dodsworth*, deceased, the account of *Charles Middleton*, as will be sufficient to raise the amount of such costs, and costs, charges, and expenses, be sold with the privy, &c.; and out of the money to arise by the said sale, when so paid into &c., let the said costs be paid. Let the petitioner, *Henry Middleton*, be at liberty to enter into a contract with the Commissioners for the Reduction of the National Debt, for the purchase, in the name and on the life of the petitioner, *Charles Middleton*, a person of unsound mind, of such a Government annuity as can be purchased by the transfer to the said Commissioners of the residue of the said 519*l.* 9*s.* 4*d.* Reduced Annuities, standing in the name of the said Accountant-General, in trust &c.: And let such residue of the said 519*l.* 9*s.* 4*d.* Reduced Annuities, the amount to be certified, &c., be transferred to the said Commissioners for the Reduction of the National Debt, as the consideration for the purchase of such annuity; And let the said Commissioners pay the said annuity to the said *Henry Middleton*, until the further order of this Court, he undertaking duly to apply the same towards the maintenance of the said petitioner *Charles Middleton*.

*Minute.*

(a) *In re Baldwin*, 6th August, June, 1827.  
1814; *In re Barrass*, 16th No- (b) 18 Ves. 285.  
vember, 1825; *In re Chabot*, 20th

1852.

July 15th.

## HINDER v. STREETEN.

A vendor, after the contract, and before the conveyance to the purchaser, died, without having devised the legal estate in the premises in trust to complete the purchase, and a suit for a specific performance of the contract against the trustees and the infant devisees of interests in his estate having become necessary, the Court made the decree without costs, there having been no default on either side.

A BILL for the specific performance of two contracts, entered into by the Plaintiff with *Henry Thomas Streeten*, in 1844 and 1849, for the purchase of two plots of land by the plaintiff from *Streeten*. It appeared, that a conversation had taken place between *Streeten* and the Plaintiff, in which *Streeten* had suggested to the Plaintiff, that it would be advisable for him not immediately to take a conveyance of the land, as in case he should sell it the conveyance might be made at once to the purchaser; to which arrangement the Plaintiff had assented. *Streeten* died in November, 1849, and the bill was brought against his devisees, some of whom were infants. The devisees in trust stated, by their answers, their ignorance of the agreements, and of the facts stated by the Plaintiff with regard to the payment of a part of the purchase money. It appeared, that the Plaintiff had expended considerable sums of money in building on the land; and the Court held the contract to be established.

Argument.

Mr. *Campbell* and Mr. *Berkely*, for the Plaintiff, submitted, that he was entitled to a decree, with costs to be paid out of the estate of the vendor, on the authority of *The Midland Counties Railway Company v. Westcomb* (a).

Sir *W. P. Wood* and Mr. *De Gex*, for the Defendants, cited the case of *Hanson v. Lake* (b), as an authority for giving no costs in such a case.

Judgment.

VICE-CHANCELLOR:—

I prefer to follow the latter decision, in which it was held, that, where there was no default, no costs ought to

(a) 11 Sim. 57.

(b) 2 Y. &amp; C. C. C. 328.



be given. In this case, it appears, moreover, that the conveyance was delayed for the convenience of the Plaintiff himself. In the meantime, the execution of the conveyance was prevented by the death of the vendor. I think the Court ought not to visit the estate of the vendor with costs, in consequence of an act over which he had no control.

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HINDER  
v.  
STRENTEN.  
Judgment.

ROBINSON v. THE GOVERNORS OF THE LONDON HOSPITAL.

June 29th &  
30th;  
1853,  
Feb. 24th.

**D. T. POWELL**, by his will, dated in 1847, gave and bequeathed all his real estate, freehold, copyhold, and leasehold, whatsoever and wheresoever, unto and to the use of trustees, upon trust for sale, and proceeded:—

Devise and bequest of freehold, copyhold, and leasehold estate, upon trust for sale, with a direction that the proceeds, after payment of all costs, charges, and expenses attending the same, shall be considered, to all intents and purposes, as part of the testator's personal estate; and a gift of the residue of his money, *London Assurance stock*, securities for money, &c. to the *London Hospital*, for

“And I declare that the money arising by such sale, after payment of all costs, charges, and expenses attending the same, shall be considered to all intents and purposes as part and parcel of my personal estate.” [The testator then gave some legacies and again proceeded:]—“All the rest, residue, and remainder of my money, Bank Stock, Government Funds and Annuities, *London Assurance stock*, securities for money, goods, chattels, and personal estate, whatsoever and wheresoever, and not hereinbefore by me disposed of, after payment of my debts, funeral and testamentary expenses, and securities or legacies I may by

the purposes of the charity:—*Held*, that the real and personal estate were thrown into one mass; and that the charge of debts, legacies, and costs were to be apportioned between the real and personal estate *pro rata*.

A direction that the proceeds of the real and leasehold estate should be considered as part of the personal estate, does not take away the right of the heir; nor does the addition to that direction, that the real estate shall be taken to be personal estate “to all intents and purposes,” take away that right.

Where the charter of a Corporation has been granted with certain terms or provisions, and the charter is subsisting and unimpeached, notwithstanding it might be open to the Attorney-General or the Crown to take proceedings for setting it aside, the Court will still deal with the Corporation as having all the rights and powers of an existing body.

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*Statement.*

these presents, or by any codicil hereto, think proper to give, I give and bequeath to the treasurer or other proper officer for the time being of the *London Hospital*, to be applied for the charitable purposes of that institution."

The bill was filed in July, 1848, by the trustees against the Governors of the *London Hospital*, the heir-at-law and customary heir, and the next of kin of the testator; and it stated that the testator was, at his death, seised of a messuage and land, partly freehold and partly copyhold, at *Tottenham*, and some leasehold estate; and that he was possessed of shares in the *London Assurance Company*, Bank Stock, and other stock or funds, money at his bankers, books, and plate and furniture; that the heir-at-law and customary heir claimed the real estate, on the ground that the devise was void; and that the next of kin insisted that the real estate was converted out and out into personal estate, and that the same ought to be sold and divided amongst the next of kin; and that the same Defendants insisted that the shares in the *London Assurance Company* could not be devised or bequeathed to charitable uses, as a large portion of the profits thereon arose from real estate.

The *London Assurance Company* was incorporated by a charter of King George I., for marine assurance, without any restriction against the investment of any portion of their capital in real estate, but with a declaration that the shares in the capital stock of the corporation should be deemed and adjudged in all Courts of law and equity and elsewhere to be personal and not real estate, and should go to the executors or administrators, and not to the heirs, of the person or persons dying possessed thereof or entitled thereto. The state of the property of the testator was found by the report, as was also the fact that the *London Assurance Company* was seised of lands to a certain value, and had lent money on mortgage of real es-

tate; and that the Bank of *England* also held lands and houses for the purposes of their business, and had lent money on mortgages which were made to trustees for the Bank.

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Mr. *Schomberg* and Mr. *A. J. Lewis* for the Plaintiffs, the trustees.

Mr. *Bacon* and Mr. *Cotton* for the *London Hospital*.

Sir *W. P. Wood* and Mr. *Fooks* for the heir-at-law.

Mr. *Elderton* for the next of kin.

Mr. *W. M. James* for the Attorney-General.

The points argued were—First, whether shares in the *London Assurance Company* and the Bank Stock were to be regarded as pure personalty, or personalty affected with land. In support of the argument that this property was pure personalty, *Attorney-General v. Giles* (a), *March v. Attorney-General* (b), *Thompson v. Thompson* (c), *Sparling v. Parker* (d), *Hilton v. Giraud* (e), *Walker v. Milne* (f), and *Doe d. Myatt v. The St. Helen's & Runcorn-gap Railway Company* (g), were cited; and also *Ashton v. Lord Langdale* (h), which it was stated was about to be the subject of appeal to the House of Lords. On the other side, that it was personalty savouring of realty, *Knapp v. Williams* (i), *Howse v. Chapman* (k), *Finch v. Squire* (l), *Tomlinson v. Tomlinson* (m), and *Myers v. Perigal* (n), which latter

(a) Cited 5 Beav. 436.

(b) 5 Beav. 433.

(c) 1 Coll. 381.

(d) 9 Beav. 450.

(e) 1 De G. & S. 183.

(f) 11 Beav. 507.

(g) 2 Q. B. 364.

(h) Before Sir J. L. Knight

*Bruce*, V.C., 11th May, 1851, reported 15 Jur. 869.

(i) 4 Ves. 430, n.

(k) 4 Ves. 542.

(l) 10 Ves. 41.

(m) 9 Beav. 459.

(n) 16 Sim. 533.

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case was also stated to be the subject of appeal; the Bank Acts 5 & 6 Will. & M. c. 20, s. 28, and 8 & 9 Will. 3, c. 20, s. 33; and the *London Assurance Company's Act* 6 Geo. 1, c. 18, ss. 6 & 9.

[The VICE-CHANCELLOR, on this point, intimated, that, if he were to consider the question as open, and to review the authorities, it would be proper that he should defer his judgment until the House of Lords had come to a decision on the question which was stated to be now before them.]

Secondly, the question of apportionment of the debts, legacies, &c., between the real and personal estate. On this point *Roberts v. Walker* (a), *Attorney-General v. Southgate* (b), *Shallcross v. Wright* (c), *Boughton v. Boughton* (d), *Falkner v. Grace* (e), were cited.

Thirdly, the question of the claims of the heir-at-law and next of kin of the testator, to the portion of the residue as to which the charitable bequest failed: *Phillips v. Phillips* (f), *Green v. Jackson* (g), *Smith v. Claxton* (h), *Fitch v. Weber* (i).

Fourthly, the question, whether the *London Hospital* was not limited by the charter to a revenue of 4000*l.* per annum.

And, fifthly, on the point of the right to a cy-pres application to charitable purposes of the property well given by the will, if the gift to the *London Hospital* should fail: *Hayter v. Trego* (k), *Attorney-General v. Reeve* (l).

(a) 1 Russ. & My. 752.

(b) 12 Sim. 77, 83.

(c) 12 Beav. 505.

(d) 1 H. L. Cas. 406.

(e) 9 Hare, 282.

(f) 1 My. & K. 649.

(g) 5 Russ. 35.

(h) 4 Madd. 484.

(i) 6 Hare, 145.

(k) 5 Russ. 113.

(l) 3 Hare, 191.

VICE-CHANCELLOR.—

There are three questions which I have now to decide,—the question arising upon the apportionment, the question as to the extent of the charter, and that between the heir and the next of kin. I must, at present, leave undecided the question as to the Bank Stock and the *London Assurance* shares.

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*Judgment.*

With regard to the question of apportionment, I do not think this case is affected by the question in the House of Lords, in the case of *Boughton v. James* (a). There was a long series of cases in this Court antecedent to *Boughton v. James*, in which it was held, that where the real and personal estate were driven into one mass, and made subject to one general set of charges, these charges were to be borne by the real and personal estate pro ratâ, according to their relative values; and the decision in *Boughton v. James*, as I understand it, does not affect that state of circumstances. It went expressly upon the ground, that, by the constitution of the will which was before the Court in that case, the real and personal estate were not thrown into one mass. Whether that principle was or was not rightly applied in the case of *Boughton v. James* depended upon the construction of that particular will; but that decision left wholly unaffected the decisions which have been held in the Courts below, and affirmed by the Courts above, that, where the real and personal estate were constituted into one mass, and that mass was made subject to charges, those charges were to be borne by the several descriptions of property, according to their relative value. What, therefore, I feel it to be my duty to hold in this case is, that there is to be an apportionment.

The next question arises upon the charter under which

(a) 1 H. L. Cas. 406.

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 Judgment.

the *London Hospital* was incorporated; and I do not think that it is necessary for me to give any opinion on that charter. The charter is a subsisting charter: it is valid until it is impeached and disturbed; and the parties have the right to receive money under it, so long as that charter stands. What might be the result of proceedings by the *Attorney-General* or by the Crown for the purpose of setting aside the charter, if the Crown thought fit to take such proceedings, is one question; and what this Court is to do in the meantime, while the charter stands, is another and a totally different question. Here is a legally constituted body, having the right to receive money by its own constitution; and so long as that constitution exists, I think it is the duty of this Court to deal with it as an existing body.

Construction of  
 the charter of  
 the *London*  
*Hospital*, distinguishing the  
 powers of donors to give  
 and the powers  
 of the Hospital  
 to take.

I do not make these observations for the purpose of shrinking from any decision of what is the effect of this charter. Looking at the charter, I am not disposed to think that the corporation is limited to 4000*l*. Without meaning to prejudice any other proceeding which may be taken, I will state what I think the true construction of this charter to be: The section referred to divides itself into two heads—first, the power given to the corporation to accept and take; and, secondly, the power which is given to other persons to give, for the benefit of the corporation. The first part of the provision is, “that the corporation and their successors shall and may, for ever hereafter, be persons able and capable in law, and may have power, notwithstanding the Statutes of Mortmain, to purchase, have, take, hold, receive, and enjoy, to them and their successors, manors, messuages, lands, rents, tenements, annuities, and hereditaments,” applying therefore to real estate, “of what nature or kind soever, in fee and in perpetuity, or for terms of lives or years, not exceeding the yearly value of 4000*l*. in all issues beyond reprises,

so far as they are not restrained by law." I agree with the observation made at the bar, that the construction of this passage is, that they are to take in the form prescribed by the statutes called the Mortmain Acts, between which and the Act of King George the Second a distinction is drawn in this charter: "notwithstanding the Statutes of Mortmain, to purchase, have, take, &c., not exceeding the yearly value of 4000*l*. in all issues beyond reprises, so far as they are not restrained by law." That is a power to purchase and take, so far as the law created by the Statutes of Mortmain does not prohibit them from purchasing and taking; and it is a power, therefore, to purchase and take land, provided the grant of land is made in the form prescribed by the Statutes of Mortmain.

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The clause then proceeds to empower the corporation to take "all manner of goods, chattels, and things whatsoever, of what nature or kind soever, for the better support and relief of the poor under their care." It therefore gives them a power to take any personal chattels, which may by law be given to charities, of what nature or value soever, to any extent. But, having given to the corporation the power to take, the Crown seems to have contemplated that there was a further thing to be provided for—the power of other persons to give; and therefore the charter, after providing for the powers of the corporation to deal with the property which they have taken, proceeds to authorise parties to give, and the Crown then grants "special license, full power, and lawful and absolute authority to any person or persons, bodies politic or corporate, their heirs and successors respectively, to give, grant, sell, alien, assign, devise, bequeath, or dispose of in mortmain in perpetuity or otherwise, to or for the use and benefit of, or in trust for, the governors of the *London Hospital* and their successors, any manors, messuages,

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lands, tenements, rents, hereditaments, annuities, sum and sums of money, goods and chattels whatsoever, not exceeding the yearly value of 4000*l*. above all charges and reprises, for the charitable purposes above mentioned, in any manner not repugnant to or made void by the statute" 9 Geo. 2, c. 36. Now, it is clear that the corporation is entitled to take "in mortmain in perpetuity," if any person will so give to them; which shews that the Crown was looking at property which could not be given in mortmain. The words "devise, bequeath, or dispose of in mortmain in perpetuity, or otherwise, to and for the use and benefit of, or in trust for, the governors of the *London Hospital* and their successors, any manors, messuages, lands, tenements, rents, hereditaments, annuities, sum and sums of money, goods and chattels whatsoever, &c.," must be considered with reference to the provisions of the Statute of Mortmain, and as applying to what, by that statute, could not lawfully be given. It enables persons to give property, which by the Mortmain Act could not be given, to the extent of 4000*l*. a year. If, therefore, it were necessary for me to decide the question upon the charter, I should feel very little difficulty. My opinion, however, is, that it is not necessary, in the present case, to arrive at any decision upon it. A charter being in existence and in force, this Court must adopt the charter as it finds it, and, so long as it exists, must enforce the right of the persons who are authorised under that charter to take property which is given to them.

The third question is that which arises between the heir and the next of kin; and, upon that, I do not think that any reasonable doubt can be entertained.

The first argument is, that this is a gift of real estate to be sold, and the proceeds of which, it is declared, shall be considered as, to all intents and purposes, part and parcel



of the personal estate. It was very fairly admitted in the argument, that a mere direction that the proceeds of the real estate should be considered as part of the personal estate, will not take away the right of the heir; but, fixing upon the words, "to all intents and purposes," it was argued, that, by force of these words, it is to be considered as personal estate, not merely as between the parties interested under the will, but as between the heir-at-law and the next of kin of the testator.

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The first question which strikes me upon that is,—what difference does the insertion in this will of the words "to all intents and purposes" make? Let us suppose, that the testator had said simply that it should be part of his personal estate, would it not be part of his personal estate "to all intents and purposes whatsoever?" I think so clearly. If the case had rested upon the clause of the will, that it shall be considered to all intents and purposes as part of his personal estate, and no further disposition whatever had followed, there might have been a question, whether you could not infer that it was to go to the next of kin; but, another answer to the argument, founded on the words "to all intents and purposes," is, that those words are followed by a gift of all the personal estate and effects. [His Honour read the residuary gift, *supra*, p. 19, from "all the rest," &c., to "London Hospital."] Having, therefore, first made this part of the personal estate, the testator has given the personal estate to the *London Hospital*; and it becomes, in this disposition, part of the residue of the personal estate which is so given.

Now, was it the intention of the testator, that his next of kin should take under this will any other part of the residue of the personal estate, not derived from the proceeds of the real estate which he had constituted part of the residue; and if the next of kin could not take any other part of the

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HOSPITAL.*Judgment.*

Fallacy of applying to a case of intestacy words which the testator has applied to the case of testacy.

residue of the personal estate under the disposition contained in the will, how could they, under such disposition, take, as part of the residue of the personal estate, the proceeds of the real estate, which the testator has made part of that residue. The truth is, that this argument has proceeded upon a fallacy on the part of those who have argued in favour of the next of kin; they have applied words which the testator has applied to a case of testacy to a case of intestacy, as if the testator meant them to apply to a case of intestacy. I think no rule is clearer than this, that every testator, when he makes his will, must be presumed to consider that the dispositions which he has made by that will are valid and effectual. You cannot impute to a testator that he gives upon the assumption that the dispositions contained in his will cannot take effect. If, then, the testator has given upon the assumption that the dispositions contained in his will can take effect, he has in truth disposed of the whole of the residue of the personal estate; and if he has so done, how can it be said that he meant, by the words "to all intents and purposes," to give the residue to the next of kin; and, if he did not mean to give the residue to the next of kin, I cannot consider upon what possible ground the next of kin can take any portion of that estate which he has constituted part of the personal estate.

It was said, that the effect of this disposition would be to strike out of the will the words "to all intents and purposes." That is by no means the effect of the construction. The effect is so to construe these words as to apply them to the purposes to which the testator has applied them,—to the testamentary purposes of the testator,—and not to strike them out of the will. I am of opinion that the heir-at-law is entitled to the monies arising from the sale of the real estate, subject of course to the charges.

I confess, that, upon the reserved point, unless the case should be altered by the House of Lords, I should have felt myself bound by the authorities. If, therefore, the decision in the House of Lords goes to confirm the previous cases, it may be considered that this suit is disposed of; but if not, it must be put into the paper again, to be spoken to upon that point, after the decision in the House of Lords.

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1853.

Feb. 24th.

The case of *Myers v. Perigal* (a) was decided by Lord *St. Leonards* on the certificate of the Court of Common Pleas,—his Lordship overruling the decision of the Vice-Chancellor of *England*; and the appeal in *Ashton v. Lord Langdale* was stated to have been abandoned. The *London Assurance* shares and Bank Stock were, therefore, taken as personal estate, without further argument.

On the apportionment of charges between real and personal estate, the respective values of such real and personal estate are to be taken as they are when the apportionment is made, and not on such values at any anterior time.

A question was then suggested, whether, in the apportionment of the charges between the real and personal estates, the respective values of such estates should be taken at the death of the testator, at the date of the decree, or at the time when the apportionment might happen to be made. The testator died in 1848, and the funds had risen considerably in price since that time. No precedent was produced of any decree fixing a particular time at which the value should be taken for the purpose of apportionment.

VICE-CHANCELLOR (b):—

It appears to me that there might be great inconvenience and difficulty in going back to the death of the testator, or to any period anterior to the time when the apportionment is made, for the purpose of fixing the value of the property. The state of investment of the personal estate at the testator's death might be such as to render it of great value; but it does not follow, that such value must be sustained; and, on the contrary, it might

(a) December 1, 1852.

(b) Sir W. P. Wood.

1852.

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have become perfectly valueless at the time of the administration of the estate. If that were so, the charges would of necessity be thrown exclusively on the real estate. The proper course seems to be, that the apportionment should be made on the value as it is at the time the proportions of the charges are settled, and the parties interested will then bear their share of the liabilities in proportion to the benefit they derive from the estate.

1851.

July 29th &  
30th;

1852,

May 28th.

SMITH v. HURST.

A debtor executed a deed, expressed to be for the better

management of his affairs and for the liquidation of his debts and engagements, and he thereby conveyed and assigned his real and personal estate and effects to one of his creditors, leaving it to the discretion of the creditor in what order and in favour of what creditors the proceeds should be applied, and giving him powers of management and sale, and to negotiate and enter into arrangements and apply the proceeds of the estate and property in carrying them into effect, such powers to terminate with his life or upon his resignation; and the debtor then went abroad, that the arrangement of his affairs might be facilitated by his absence. The Court, upon such circumstances, *held*, that the deed was not framed to secure any debt due to the creditor to whom the conveyance and assignment was made; and that the deed (independently of the grantee being a creditor, and of any communications with other creditors,) was a mere deed of management; that it was competent to the debtor to revoke it; and that it was fraudulent and void against other creditors.

A creditor cannot vest his property in one of his creditors for the purpose of protecting himself against his other creditors. A deed executed for such a purpose is fraudulent and void against the latter, and the creditor taking such a conveyance is a party to the fraud, and cannot be in a better position than the debtor.

In the case of a deed vesting property in trustees upon trust for the benefit of particular persons, the deed cannot be revoked, altered, or modified by the party who has created the trust; but, in cases of deeds purporting to be executed for the benefit of creditors, the question, whether the trusts can be revoked, altered, or modified, depends on the circumstances of the case; and therefore, when it appeared that communications had taken place with creditors of the grantor not parties to the deed, the Court, in treating the deed as against the parties to it as fraudulent, directed inquiries as to the interests of the creditors not parties.

A deed which a debtor has power to revoke, and which he attempts to use as a shield against his creditors, cannot be otherwise than fraudulent and void against them.

The Court only interferes in aid of the legal right when the party has proceeded at law to the extent necessary to give him a complete title; and therefore, where the Plaintiff had obtained judgment, but had not sued out an *elegit*, it was *held*, that he was not entitled to the aid of the Court as against the freehold estate of the debtor; that he did not under the statute 1 & 2 Vict. c. 110, s. 13, become entitled to such aid until the expiration of one year from the time of entering up his judgment; and that this, being an objection that the Plaintiff's title was incomplete, was therefore not removed by a resort to the jurisdiction of the Court to relieve against fraud in respect to the freehold estate.

The Court will interpose to remove legal impediments out of the way of judgment creditors, or for the preservation of the property pending disputes at law as to the rights of judgment creditors; but the Court does not supply or extend legal rights.

*wick*, and *F. O. Byrne*. The original bill was filed on the 1st of February, 1845, and stated, that in October, 1844, the Defendant, *Robert Henry Hurst*, was tenant for life under the will of his father of considerable freehold, copyhold, and leasehold estates, subject to incumbrances, and entitled absolutely to other freehold, copyhold, and leasehold estates, subject to incumbrances, and was possessed of considerable personal estate; that, being then largely indebted to the Plaintiffs and to other persons, he determined to make a conveyance to *Padwick*, his solicitor and confidential agent, under the pretence of making provision thereby for the payment of his debts, but in reality for his private convenience, and for the purpose of hindering, delaying, and defeating his creditors, and particularly the Plaintiffs; and that, accordingly, a conveyance and assignment was made by him to *Padwick*, by a deed dated the 29th of October, 1844; that the deed was kept secret from the Plaintiffs and the other creditors; that *Hurst*, notwithstanding the execution of the deed, continued in possession of the property; but that he soon afterwards went abroad; and that after he had gone abroad it was communicated to the Plaintiffs by *Padwick's* agent, that the conveyance and assignment had been made to *Padwick*, in trust for creditors; but that the deed was not produced(a); that the Plaintiffs, on the 28th of November,

1852.  
SMITH  
v.  
HURST.  
—  
*Statement.*

(a) The deed, dated the 29th of October, 1844, was made between *Robert Henry Hurst*, of the one part, and *Padwick*, of the other part. It recited the title of *Hurst* to the estates, or the equity of redemption thereof; and that *Hurst* had made and executed to divers persons various mortgages, grants of annuities, &c.; and that he was indebted to divers persons upon judgment, bond, simple contract,

&c.; and that *Hurst*, in order to the better arrangement of his affairs, and the adjustment and liquidation of his debts and engagements, was desirous of vesting all his property, real (other than copyhold) and personal, in *Padwick*, upon the trusts thereafter expressed; and then followed the grant of the estates to which *Hurst* was entitled under the will of his father, for a term of 100 years, if *Hurst* should so long live; and

1862.

SMITH

v.

HURST.

*Statement.*

1844, brought an action against *Hurst* for 12,000*l.* and upwards, the balance due to them on a banking account. The bill stated a correspondence which ensued pending the action, in the course of which an offer was made on the part of *Padwick* to give the Plaintiffs security on *Hurst's* life interest, and on a life interest in remainder, to which the son of that Defendant was entitled; and in one of these letters it was stated, that no creditor was a party to the deed except *Padwick*, and that he was not a party in that character. The bill stated, that a consent was given to judgment being signed in the action in default of the debt being paid on or before the 21st of January, 1845; and that, the debt not having been paid, judg-

the assignment of the leasehold estate, to *Padwick*, his executors, administrators, and assigns, upon the trusts thereafter declared; and an appointment of the remainder in fee of *Hurst* under the will of his father, and all other his estates in fee, to *Padwick*, his heirs, and assigns; and an assignment of all his household goods, books, pictures, &c., bills, securities for money, and all other his personal estate (excepting wearing apparel), with a power of attorney for getting in and realising the same, upon trust, that *Padwick* should let, set, and manage the freehold and leasehold estates, properties, and premises, in such way and manner as he should, in his absolute and uncontrolled judgment and discretion, think fit and most conducive for the objects and purposes of the deed, with powers of sale, &c., and should pay and apply the surplus proceeds of sales, and the rents and pro-

fits, after satisfying the incumbrances and charges, in or towards the payment and discharge of the interest of all or any or either of the mortgage and other debts of *Hurst*, or in or towards payment of the principal of such debts, whether with or without reference to this order of charge or priority, or any part or parts of such principal or interest, according to the absolute and uncontrolled discretion of *Padwick*, and as he might from time to time judge to be requisite or proper and most conducive to the objects and purposes of the deed; and, subject to such trusts and purposes, in trust for *Hurst*, his heirs, executors, administrators, and assigns, respectively; and among other provisions was one, that the trusts of the deed should be personal to *Padwick*, and should terminate with his death or upon his resigning the trusteeship, which he was to be at liberty to do.

ment was signed on the 22nd of January, and a fi. fa. issued; but that the execution of the fi. fa. was prevented by *Padwick*, who was in possession of the property, and had produced the deed to the sheriff's officer, and told him that the sheriff must return nulla bona, and that under these circumstances the sheriff would make that return.

1852.  
SMITH  
v.  
HURST.  
—  
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The bill then contained allegations to the effect, that the fi. fa. had not been returned, and that no writ of elegit could be issued until it was returned; and that, if a return of nulla bona was made, other creditors of *Hurst*, who had obtained judgments and issued executions, would acquire a prior right at law against the personal effects of *Hurst*; that all the freehold, copyhold, and leasehold estates were in mortgage, and the legal estate outstanding in the mortgages; and that the Plaintiff's judgment had been duly registered. The bill charged that the deed was executed merely for the private purposes and for the convenience and accommodation of *Hurst*, and not in consequence of any agreement or arrangement made between him and any of his creditors; and that no such creditor had executed the deed, or assented to or agreed to adopt or be bound thereby; that the deed was revocable at the sole will and pleasure of *Hurst*; and that the total value of the real and personal property comprised in the deed, and the whole personal estate and effects of the defendant *Hurst*, were not sufficient for the payment of his debts.

The bill prayed that the deed of the 29th of October, 1844, might be declared to be fraudulent and void as against the Plaintiffs; that the Defendants might be decreed to do all necessary acts for vacating and setting aside the deed in favour of the Plaintiffs; and that the Plaintiffs might be declared entitled to a lien for the amount

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of their judgment debt, and interest upon all the equitable and beneficial estate of *Hurst* in the property comprised in the deed, and to have equitable execution against the same; that an account might be taken of the property comprised in the deed; and that the Plaintiffs might be paid the principal and interest upon their judgment out of the personal chattels, goods, and effects comprised in the assignment, so far as the same would extend; or that the Plaintiffs might be at liberty to levy execution thereupon after the assignment was set aside; that the Plaintiffs might be at liberty to sue out writs of *elegit* against the freehold, copyhold, and leasehold estates of *Robert Henry Hurst*, after the *fieri facias* should have been returned, and might have such equitable execution thereof as they would have been entitled to, if they had sued out the same immediately upon the failure of execution under their writ of *fieri facias*; and that so much of the Plaintiffs' judgment as should not be satisfied by the personal chattels and effects, might be paid by the rents and profits, or by a sale of the real and leasehold estate comprised in the deed. The bill also prayed an injunction to restrain alienation and waste of the estate, and for a receiver.

A receiver, who was to have possession of the personal estate, furniture, and chattels, was appointed in March, 1845<sup>(a)</sup>.

The supplemental bill was filed on the 30th of January, 1846, and brought forward the facts of the expiration of the year from the period of the registration of the Plaintiffs' judgment, and of the Defendant *Hurst* being entitled to some estates not comprised in the deed; and it prayed that the 12,106*l.* 18*s.* 4*d.*, for which judgment was recovered by the Plaintiffs, with interest, might be de-

(a) See *Smith v Hurst*, 1 Coll. 705.



clared to be well charged, by virtue of the stat. 1 & 2 Vict. c. 110, upon all the freehold, copyhold, and leasehold estates of *Hurst*, including those comprised in the deed; and that *Hurst* might be decreed to pay such judgment debt, interest, and costs at law and in equity, by a short day; or, on default, that the same might be raised and paid to the Plaintiffs by a sale of all such estates or a competent part thereof. And the supplemental bill prayed, that, in the mean time, and for the purpose of securing to the Plaintiffs the benefit of their judgment and charge, the Defendants might be restrained from waste or alienation of the real estates of *Hurst*, and for a receiver of all such real and leasehold estates.

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The Defendant *Padwick*, in several passages contained in his answer to the original bill, which were read in evidence against him, admitted, that, at the time of the execution of the deed in question, *Hurst* was largely indebted to the Plaintiffs; that he (*Padwick*) was the confidential solicitor and agent of *Hurst*; that *Hurst* left this country on the 31st of October, 1844, under the impression that the arrangement of his affairs would be facilitated by his absence, and that he would be thereby saved from personal annoyance, and from being served with process at the suit of the Plaintiffs or any of his creditors. He also admitted the action brought by the Plaintiffs, the correspondence, and the issuing of the execution; and he said, that he believed that the sheriff's officer proceeded with the writ or warrant granted thereon, for the purpose of executing the same, to the residence of *Hurst*, at *Horsham*; and that, on his approach to the house, the door was closed upon him, and that he was then, and has more than once been, refused admittance thereto. The Defendant insisted, that he (*Padwick*), under a certain deed which he referred to, was in possession of the house on behalf of certain mortgagees, inasmuch as he had been constituted receiver of

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the estates contemporaneously mortgaged to them; and that, under the circumstances appearing in his answer, he was then, and had ever since been, and was, in possession of the furniture, goods, and effects in and about the house, but whereof the greater part had belonged to *Robert Hurst*, deceased, of whom the Defendant *Hurst* was the sole acting executor and residuary legatee, and certain of whose (*Robert Hurst's*) debts and legacies were still unpaid; and, after referring to some communications which he had had with the sheriff's officer, he said, that at such interview Defendant produced and exhibited to the sheriff's officer the deed of trust; and that, on Defendant being asked by the officer what he could do in the matter, the Defendant then in a general way told or intimated to the sheriff's officer, that, by reason of such conveyance and assignment, he might return nulla bona to any writ or writs of execution which might be issued against *Hurst*, or to that effect.

The Defendant *Padwick* also fully stated the deed (a), which he termed a deed of trust and management. He admitted that no creditor of *Hurst*, nor any other person except *Hurst* and himself (*Padwick*), ever executed the deed, or was in any manner a party or privy to the deed at or before the time when the same was made and executed; save that Mr. *Philpotts* was not only privy to it and was an attesting witness thereto, but it was upon and at his express advice and urgent instance that the same was made and executed by *Hurst*; and that, in consequence thereof and reliance thereon, Mr. *Philpotts* had abstained from taking out execution on his judgment; and also save that the Defendant *Padwick* himself was before the date of the deed, and still is, a large creditor of *Hurst*, not only by mortgage for 3000*l.* and interest, but also by simple con-

(a) *Supra*, p. 31, n.

tract for money lent and paid, and professional business done for *Hurst* to the amount, as Defendant estimated and believed, of 1500*l.* and upwards, with interest; besides which, the Defendant was surety for *Hurst* to various creditors of that Defendant, and for the payment of such last-mentioned debt, and against Defendant's risk and liability under such suretyship, the Defendant then had no other security, indemnity, or protection than what he might derive from the deed, and than his lien, as the attorney and solicitor of the Defendant *Hurst*, on the deeds and papers which Defendant in that character had in his power or custody; and of which lien, as well as of the security and indemnity or protection to be derived by him from or by means of the deed, the Defendant claimed the full benefit. Besides which, he said, that, at the time when such deed was proposed and determined on and ultimately executed, the Defendant was acting as the solicitor for several bond and simple contract creditors, and also for all the mortgage creditors therein named or referred to, and as to some others for whom he was not solicitor, their solicitors had generally authorised him to see to their interests as creditors of *Hurst*; and that it was, therefore, then an object with him (*Padwick*), not simply on his own behalf, but likewise for the benefit of the several mortgage and other creditors for whom he was acting, to get *Hurst's* property out of him, in order that he might not spend the same, but let it be available for his creditors; and that he (*Padwick*), moreover, was, and continued to be, a trustee for divers persons and purposes in relation to the estate and affairs of *Hurst*; and that he, in accepting the trusteeship under the deed, had regard to the interests, not only of himself as such creditor, but also of *Hurst's* mortgage and other creditors, and of other persons and purposes for whom and which Defendant was such solicitor and trustee. And he insisted, that, under the circumstances aforesaid, and having regard to the language and

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tenor of the deed of trust and management, and particularly to the provision therein contained, whereby his rights and remedies as a creditor of *Hurst* were expressly saved, the Defendant was to be considered as having been a party as well as privy to the deed, in the character of a creditor of *Hurst*; and the Defendant, under the circumstances, denied that he was a party thereto only in the character of the solicitor or agent of *Hurst*; and he moreover denied that the deed was executed merely for the private purposes or for the convenience and accommodation of *Hurst*, save as the making provision, as was thereby done, for liquidating his debts and the adjustment of his affairs was a purpose of that Defendant, and would necessarily and properly conduce to his convenience and accommodation; the fact, on the contrary, being, that it was under the circumstances and for the purposes and objects respectively thereinbefore mentioned or appearing, that the deed of trust and management was determined upon, made, and executed.

The Defendant *Padwick* also said, that he had made certain payments for taxes, and for wages due to servants when they were dismissed, and to other small creditors, with such (if any) monies as he had for the time being in his hands under the deed, so far as such monies would extend; but which being greatly insufficient to meet such payments or to reimburse the Defendant in respect thereof, he (*Padwick*) was then considerably in advance and out of pocket on account of the property comprised in the deed. He denied that the deed was kept secret; he also denied that any part of the property remained in the possession of *Hurst* after the deed was executed, except some small part of it, which, he said, was retained under an arrangement made before the date of the deed. He admitted the estates to be in mortgage, and submitted to the judgment of the Court, whether, having regard to the

facts stated by his answer, the deed or any of the trusts thereby declared had or not always been, or whether they were then, revocable by and at the sole will and pleasure of *Hurst*; and particularly whether such deed or trusts, if revocable to any extent or against any parties, were revocable against him (*Padwick*), unless upon payment of the whole of his demands against *Hurst*, and his full indemnification against the several suretyships into which he had so as aforesaid entered for him.

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The Defendant further submitted, whether, even if the deed had never been executed or were now removed out of the way, the Plaintiffs could, as judgment creditors of *Hurst*, have any relief against his mortgagees and incumbrancers other than by being allowed to redeem them, but which the Plaintiffs did not ask or seek, nor were the mortgagees or incumbrancers parties to the suit; and he submitted, whether the Plaintiffs could entitle themselves as judgment creditors to that or any other relief against the real estates of *Hurst*, unless by suing out a writ of *elegit* upon their judgment, but which they had not done; and he also submitted, whether the Plaintiffs were or would be in a position to ask any equitable relief upon their judgment until after the lapse of a year from the time of entering up such judgment.

In his answer to the supplemental bill, *Padwick* admitted that the Defendant *Hurst* was tenant-in-tail of an estate not comprised in the deed.

The answers of the other Defendants introduced no other facts, the Defendant *Byrne* being only another judgment creditor of *Hurst*.

The evidence on the part of the Plaintiffs merely proved their judgment and the correspondence. On the part of the

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Defendant *Padwick*, several witnesses were examined; one, —Mr. *Phillpots*,—after deposing to his having been a large creditor of *Hurst*, and having obtained a mortgage for his debt, stated, that he did not propose or suggest to the Defendant *Hurst* to execute any trust deed for the benefit of him (*Phillpots*) and his other creditors; but, upon hearing from him the involved state of his affairs, he advised him to retrench his expenses and break up his establishment, and retire for a short time to the continent; to place his concerns in the hands of some gentleman, who should be empowered to act for him in his absence in managing his property, and in making arrangements with his creditors. That the Defendant *Hurst*, after some hesitation, consented to follow the witness's advice, and asked him to undertake the business, or to join *Padwick* in doing so. The witness, however, declined to take upon himself so onerous a duty, but promised to afford his advice and assistance to *Padwick*, or whoever *Hurst* might appoint in the settlement of his (*Hurst's*) affairs. Beyond this, the witness stated he had nothing to do with the arrangement; and when the deed was brought to him by *Padwick* and *Hurst* for him to attest their execution, he was ignorant of its contents, and supposed that it was a deed to carry out his suggestion. The witness said, he advised that there should be full power for *Padwick* to manage the concerns in the absence of *Hurst*. Other witnesses proved that they were creditors of the Defendant *Hurst* in and before October, 1844, and employed *Padwick* to recover or obtain security for their debts; and that he afterwards told them, that *Hurst* had executed a deed of conveyance and assignment to him (*Padwick*), in trust for his (*Hurst's*) creditors; and some of them stated, that they abstained from suing for their debts upon the faith of the deed. It was also proved on the part of *Padwick*, that, independently of his mortgage debt, he was a creditor of the Defendant *Hurst* at the time when the deed in question was executed, to a consi-

derable amount; and that immediately upon the deed being executed, he acted upon it.

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At the hearing of the cause,

The *Solicitor-General* and Mr. Cotton, for the Plaintiffs, argued, that it was clear from the circumstances of the case that the deed of October, 1844, was a deed of agency, and in no respect a deed of trust: *Bill v. Cureton* (a). It would expire with the Defendant *Padwick*; and the powers it gave would not be continued in any representative or succeeding trustee, and there was nothing to prevent the immediate revocation of the deed by its author: *Walwyn v. Coutts* (b), *Garrard v. Lord Lauderdale* (c), *Wilding v. Richards* (d). It was therefore an instrument which this Court would not permit to stand in the way of creditors. The deed, moreover, was clearly voluntary, under the 13 Eliz. c. 5, and being so, it was fraudulent against creditors: *Townsend v. Westacott* (e), *Skarf v. Soulby* (f), as overruling *Lush v. Wilkinson* (g). The circumstance that the year had not expired after the registration of the judgment, when the bill was filed, was no objection, as the Court would entertain a suit for the protection of the property in the meantime: *Bristed v. Wilkins* (h).

Mr. Follett, for the Defendant *Padwick*.—This case is one of the first impression. There is no precedent in this Court of a party, having nothing more than an execution against a debtor, coming to set aside a trust deed of this nature created by the debtor. The *fi. fa.* had not been re-

(a) 2 My. & K. 503.

(b) 3 Sim. 14; 3 Mer. 707.

(c) 3 Sim. 1.

(d) 1 Coll. 655.

(e) 2 Beav. 340.

(f) 1 Mac. & G. 364.

(g) 5 Ves. 384.

(h) 3 Hare, 235. See *Watts v. Jefferyes*, 3 Mac. & G. 372.

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turned when the bill was put on the file, and nothing had been done to give the Plaintiffs any charge on the real estate which the bill seeks to affect. The deed is in its nature and object irrevocable, until the trusts for which it was created have been performed. Independently of other creditors, it is sufficient that *Padwick* had acquired an interest in the property comprised in the deed, and subjected himself to liabilities in respect of it; and the Court will not take it out of his hands without satisfaction of his claims, and without giving him ample indemnity. If *Padwick* be entitled to any indemnity against *Hurst*, he must be entitled to it against the creditors of *Hurst*. It is, however, plain upon the evidence that enough has been done to render the deed irrevocable as against creditors, even if it had not been so in the first instance: *Griffith v. Ricketts* (a), *Kirwan v. Daniel* (b), *Harland v. Binks* (c), *Acton v. Woodgate* (d). The later decisions with regard to deeds expressed to be made for the benefit of creditors all tend to shew that the principle of *Garrard v. Lord Lauderdale* is not to be carried farther: *Law v. Pagwell* (e), *Browne v. Cavendish* (f), *Simmonds v. Palles* (g). If the deed gives any creditor a charge upon the estate, it is not within the statute 13 Eliz. c. 5: *Holbird v. Anderson* (h), *Pickstock v. Lyster* (i). In truth, however, the suit cannot be sustained on the ground that the deed is voluntary under the statute; for, if that be the case, the Plaintiffs might treat it as void, and proceed with their legal remedy; and in that case they have no title to or need of equitable relief. The relief sought by the supplemental bill, founded on the expiration of the year from the regis-

(a) 7 Hare, 307.

(b) 5 Hare, 493.

(c) 15 Q. B. 713.

(d) 2 My. & K. 492.

(e) 4 Dr. & War. 398; Per Sir  
*E. Sugden*, 406.

(f) 1 J. & L. 606; Per Sir *E.*  
*Sugden*, 635.

(g) 2 J. & L. 489; Per Sir *E.*  
*Sugden*, 495.

(h) 5 T. R. 235.

(i) 3 M. & Selw. 371.



tration of the judgment, is relief which, as it could not be obtained on the original bill, neither can it be had on the supplemental bill.

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Mr. *Terrell* appeared for the Defendant *Hurst*; and Mr. *Bates*, for the Defendant *F. O. Byrne*.

VICE-CHANCELLOR:—

The principal question in the original cause appears to me to be, whether the deed of the 29th of October, 1844, is fraudulent and void against the Plaintiffs; for I think, that, independently of the questions as to the validity of the deed, and as to the rights of the Plaintiffs under the statute 1 & 2 Vict. c. 110, which do not arise upon the original bill, further than as the Court might be bound to interfere for the protection of the property, with a view to the future right arising under the statute, the bill hardly states a case for the interposition of a Court of equity. Independently of the remedies given by the statute referred to, the rights of judgment creditors are, as I conceive, purely legal rights; and the interposition of this Court in their favour rests, as I apprehend, upon the principle of aiding the legal right. Thus, the Court may be called upon to interpose its aid for the purpose of removing out of the way any impediments which may exist to the exercise by judgment creditors of their legal rights, or it may, as I apprehend, be called upon to interfere for the preservation of the property, pending disputes at law as to the rights of judgment creditors; and the Court, in the exercise of its original jurisdiction in the administration of assets, may also have occasion to deal with the legal rights of judgment creditors; but the province of this Court is to aid, and not to supply or to extend, the legal right. These principles were laid down by Lord *Cottenham* in

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*Neate v. The Duke of Marlborough* (a): and in the principles there laid down I fully concur.

I proceed, therefore, to examine the question as to the validity of this deed, and it will be convenient to consider the question in two points of view: First, as to the validity of the deed, without reference to the circumstance of *Padwick* being a creditor of *Hurst*, and to the dealings which are alleged to have been had under the deed; and secondly, to what extent, if at all, the deed ought to be upheld with reference to the position of *Padwick*, and what has taken place since the deed was executed.

As to the first point, it is unnecessary, I think, to say much upon it. There can, I apprehend, be no doubt that this deed, taken by itself, and without reference to the position of *Padwick* and to the dealings with other creditors, was a mere deed of management, which it was competent to *Hurst* at any time to alter or revoke; and as little doubt can, I think, be entertained, that such a deed could not be permitted to be set up against creditors, but would be fraudulent and void against them. A deed, which the debtor has power to revoke, and attempts to use as a shield against his creditors, cannot, I think, be otherwise than fraudulent and void against the creditors.

The true question in the original cause must therefore, as I think, depend upon the second point, how is the validity of the deed affected by *Padwick's* having been a creditor of *Hurst* at the time of its execution, and by the dealings which have been had with creditors under it. And first, with reference to *Padwick*: Subject of course to the statutory rights in case of bankruptcy or insolvency, and other statutory remedies, every debtor

(a) 3 My. & Cr. 421.

has, as I apprehend, according to the law of this country, a perfect right to deal with his property in any mode which he may think best, provided he acts honestly in the disposal of it. He may dispose of it in favour of all or of any one or more of his creditors; and the law does not, so far as I am aware, interfere with his power and right to do so, if it be exercised *bonâ fide*; but I am not prepared to hold that the law of this country will permit a debtor to vest his property in one of his creditors for the mere purpose of protecting himself against the claims of his other creditors, or that a deed executed for such a purpose can be otherwise than fraudulent and void against the creditors whose interests are affected by it. Such a deed, although upon the face of it for the benefit of the creditors, is in truth a deed for the benefit of the debtor; and the creditor who accepts it, takes, not for his own benefit, but for the purpose of carrying out the views and objects of the debtor in fraud of his other creditors. He becomes a party to the fraud of the debtor, and being a party to the fraud, he cannot, I think, be in any better position than the debtor who has perpetrated it. What then was the purpose and object of this deed? Was it executed for the purpose of securing the debt due to *Padwick*, or for the purpose of hindering and delaying the creditors of *Hurst*, and compelling them to come to such terms for his benefit as *Padwick* should think proper to dictate. The deed itself, and the conduct of the parties under it, must determine this question. The deed purports by the recitals to be for the better arrangement of *Hurst's* affairs, and for the liquidation of his debts and engagements. It is left to the discretion of *Padwick* in favour of what creditors, and in what order of priority, the proceeds of the property should be applied. Power is given to him to negotiate and enter into compromises and arrangements, and to apply the proceeds of the property for the purpose of carrying them into effect. The trust is personal to him

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and is to terminate with his death or resignation, and he has an unqualified power to resign; a salary also is reserved to him for collecting the income, and there is no mention throughout the deed of any unsecured debt being due to him. All these provisions seem to me to shew that this deed was not framed for securing any debt due to *Padwick*. Could it be intended that he should exercise a discretion as to the application of the proceeds in payment of his own debt? Was his death to deprive his executors of all claim under the trust? Was he to receive a salary for collecting the rents for his own benefit? Such could not, I think, be the purpose of the deed; but, on the other hand, these provisions all tend, I think, to shew that the object of the deed was to compel the creditors to come to such arrangements as *Padwick* should propose for the benefit of *Hurst*, and the conduct of the parties confirms this view; for, immediately after the execution of the deed, *Hurst* goes abroad, under the impression, as is avowed by the answer, that the arrangement of his affairs would be facilitated by his absence; and *Padwick* proposes terms of compromise with the Plaintiffs; and in the course of the correspondence which ensued, there is an admission by *Padwick's* agent, that he had not become a party to the deed in the character of creditor. I am of opinion, therefore, that this deed cannot be maintained, so far as its validity depends on any debt having been due to *Padwick*.

It was said, however, that other creditors had abstained from suing upon the faith of this deed, and that the deed ought to be supported on that ground; but these creditors are not parties to this suit, and no objection was raised at the hearing, or is raised by the answers, upon the ground of their not having been made parties; and I think that sufficient justice will be done to them and to *Padwick* in this case by reserving their rights, and directing such inquiries as may enable the Court to give *Padwick* any pro-

tection in respect of their claims to which he may be justly entitled. Many of the cases upon voluntary deeds were cited and commented upon in the argument of this case; and I have thought it right, therefore, to examine the authorities upon the subject. They appear to me to result in this, that, in cases of deeds vesting property in trustees upon trust for the benefit of particular persons, the deed cannot be revoked, altered, or modified by the party who has created the trust; but that in cases of deeds purporting to be executed for the benefit of creditors, the question whether the trusts can be revoked, altered, or modified, depends upon the circumstances of each particular case. It is difficult, at first sight, to see the distinction between the two classes of cases; for, in each of the classes a trust is purported to be created, and the property is vested in the trustees; but I think the distinction lies in this:—In cases of trust for the benefit of particular persons, the party creating the trust can have no other object than to benefit the persons in whose favour the trust is created, and, the trust being well created, the property in equity belongs to the cestui que trust as much as it would belong to them at law, if the legal interest had been transferred to them; but in cases of deeds purporting to be executed for the benefit of creditors, and to which no creditor is a party, the motive of the party executing the deed may have been either to benefit his creditors or to promote his own convenience; and the Court there has to examine into the circumstances, for the purpose of ascertaining what was the true purpose of the deed; and this examination does not stop with the deed itself, but must be carried on to what has subsequently occurred, because the party who has created the trust may, by his own conduct, or by the obligations which he has permitted his trustee to contract, have created an equity against himself. Each case of the latter description being thus governed by its circumstances, any further examination of

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the authorities would, I think, be useless. It would lead to the ascertainment of no principle, and would only involve the question whether the principle has been rightly applied. Under the circumstances of this case, I think the application of it must be such as I have before stated.

A further objection was raised on the part of the Defendants to any decree being made in this case, upon the ground that no *elegit* had been issued: and upon looking into the cases upon this subject, I think, that, so far as respects the freehold estates, this objection is good. Lord *Redesdale*, in his *Treatise on Pleading*, deals with the question thus:—"Courts of equity will also lend their aid to enforce the judgments of Courts of ordinary jurisdiction; and, therefore, a bill may be brought to obtain the execution or the benefit of an *elegit* or a *fieri facias*, when defeated by a prior title, either fraudulent or not extending to the whole interest of the debtor in the property upon which the judgment is proposed to be executed." "In any case, to procure relief in equity, the creditor must shew by his bill, that he has proceeded at law to the extent necessary to give him a complete title. Thus, in the cases alluded to, of an *elegit* and *fieri facias*, he must shew that he has sued out the writs, the execution of which is avoided, or the defendant may demur; but it is not necessary for the plaintiff to procure returns to those writs" (a). And the

(a) Lord Red.Tr. 101, ed.3. In "A Treatise on Discovery of Evidence by Bill and Answer in Equity:" Lond. 1836; (p. 112), the writer cited a passage from the judgment in *Whitmore v. Thornton* (3 Price, 248), on the subject of the aid afforded by this Court to judgment creditors, in which the rule was stated to be, that "where there is no trial to be had, there can

be no discovery to be sought; and if a verdict had passed simpliciter, without more, a bill then filed for a discovery might be demurred to, for there could be no discovery there any more than as to a matter not at issue." And in a subsequent passage of the same Treatise (p. 115), referring to the judgment of Lord *Eldon* in *Mountford v. Taylor* (6 Ves. 791), a bill by a creditor, who had

Vice-Chancellor *Knight Bruce*, in his decision upon the motion in this case, seems to have proceeded upon the same grounds (a). It was attempted in the argument to answer this objection, by putting the case upon the ground of the jurisdiction of the Court to relieve against fraud; but the objection rests upon the Plaintiffs' title being incomplete without the elegit, and the answer, therefore, does not meet the objection. I am of opinion that the Plaintiffs are entitled to a decree in the original suit, but only as regards the leasehold and personal estate; and I

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sued out elegits, for discovery of freehold estates, the writer concluded, that *discovery* in aid of execution was "an exception to the general principles upon which the Court proceeds." The writer had afterwards a communication on the point with the late Mr. *Jacob*, who kindly furnished him with some cases within his experience, in which bills had been filed for discovery in aid of execution, after verdict and judgment. The writer has thought, that the following extract of a note from Mr. *Jacob* (23rd of March, 1840), on a point of somewhat rare occurrence, may not be unacceptable to the Profession, or inappropriate to the subject of the above case:—

"One of the cases you inquire about was *Blanchard v. Cavendish*. It occurred about 1831. The bill asked, amongst other things, for a discovery of the defendant's parliamentary qualification, and of articles of chattel property alleged to be secreted by him. There was a demurrer to this part of the bill, upon the ground that it

prayed relief,—it being contended, that it should, as to this matter, have been confined to discovery. The demurrer was overruled by the Vice-Chancellor as informal, for covering too much. There was an appeal, but the Defendant died before it came on. The case decided nothing as to the point in question, as it went off on the point of form. In the other case, I drew the bill against the late Lord *F.*, for a discovery of chattel property in aid of a *fi. fa.* I believe that nothing was done in the suit after filing the bill, the defendant having died soon afterwards. I have not any doubt about such a bill being sustainable, either to discover lands in aid of an elegit (as in *Mountford v. Taylor*, 6 Ves. 788), or to discover goods in aid of a *fi. fa.* But, in the latter case, it is of scarcely any practical use, as the defendant may remove or sell the goods; and this is, probably, the reason why such bills are so seldom heard of: see *Horn v. Horn*, Ambl. 79."

(a) 1 Coll. 706.

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think they are also entitled to the usual decree in the supplemental suit.

It was insisted, that, the deed being set aside in the original suit, *Padwick* would not be a necessary party to the supplemental suit; but, the deed being set aside only as to creditors, I think there must be the usual decree in that suit against him, as well as against *Hurst*.

Minute.

IN the original suit:—Declare the deed fraudulent and void against the Plaintiffs as to the personal and leasehold estate. Injunction to restrain Defendants, *Padwick* and *Hurst*, from in any manner setting up the deed, so as to defeat or hinder the Plaintiffs' execution upon or against the leasehold and personal estate. Direct an account against *Padwick* of his receipts under the deed in respect of the personal estate and rents, and how profits of the leasehold applied and disposed of. Inquire, whether at any time or times, and when after the execution of the deed, any communications or communication were or was had by *Padwick* with any and which of the creditors of *Hurst* respecting the deed, and what was the nature, purport, and effect of such communications or communication, and whether any and which of such creditors, at any times or time, and when, in any and what manner adopted or acted upon the deed, with liberty to state special circumstances. Continue the order for receiver. Dismiss rest of original bill. The decree to be without prejudice to the rights of any creditors or creditor, who may be found to have adopted or acted on the deed.

In the supplemental suit, decree against *Padwick* and *Hurst* for account, and for sale of the real estates (a). Reserve further directions and costs.

(a) See *Clare v. Wood*, 4 Hare, 81.



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SIMPSON v. DENISON.

**T**HE *Great Northern Railway Company* and the *Ambergate, Nottingham, and Boston, and Eastern Junction Railway Company*, entered into an agreement of the 5th of May, 1852, the terms of which were set forth in a memorandum, which was as follows:—

“The *Great Northern Railway Company* to give the following terms, bearing harmless the *Ambergate Railway Company* against all liabilities, whether of canals or otherwise. The *Great Northern Railway Company*, until an Act of Parliament can be obtained, to work the traffic of the *Ambergate Railway Company* from the 1st of July next, and to pay to the *Ambergate Railway Company* such tolls as will, after answering all expenses and liabilities, furnish a dividend of 4l. per cent. on the paid-up share capital of the *Ambergate Railway Company*; and, as soon as an Act of Parliament can be obtained, will guarantee a dividend of 4l. per cent. upon such capital. The *Great Northern Railway Company* to apply, at their own expense, for an Act of Parliament to ratify such arrangement; and, in case such Act is not obtained in the first session, the application to be renewed, always at the expense of the *Great Northern Railway Company*, unless the same be lost by default of the *Ambergate Company*. The *Great Northern Railway Company* to have the privilege of paying off

June 12th,  
24th, & 28th.

The object of the 87th section of the Railways Clauses Consolidation Act, (8 Vict. c. 20), is to enable one Railway Company to contract for the passing of their trains to the limits of the railway of another Company, with the incidents which ordinarily attach to such power of passing, including that of stopping at the stations on the line, and carrying passengers and goods to and from such stations. But it does not enable one Railway Company, under colour of passing over the line of another Company, to carry the whole of the traffic of the other railway over which they may agree to pass.

An agreement by one Railway Company for the payment to another of such an amount as will, after answering all expenses and liabilities, furnish a certain dividend on the paid-up capital of such other Company, is not an agreement for the payment of a toll within the meaning of the 87th section of the Railways Clauses Consolidation Act.

It is not lawful to apply the funds of a Company in an application to Parliament for powers to extend the business of the Company beyond the objects for which it was constituted, and the Court will interfere, by injunction, at the suit of a shareholder to restrain any such application.

The same principles which regulate the rights of parties in ordinary partnerships, are applicable in determining the duties of the managing bodies in Joint-stock Companies as between them and members of such Companies.

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the *Ambergate* shareholders at par, on giving six months' notice at any time after the obtaining of the Act. No further call to be made on the *Ambergate* shares."

The Plaintiffs in this suit were some of the shareholders of the *Great Northern* Railway Company, suing on behalf of themselves and the other shareholders of the Company, against the Defendants who were the directors personally, against the Company in its corporate capacity, and against the *Ambergate* Company; and it prayed an injunction to restrain the directors and the Company from working the traffic of the *Ambergate* Company, and from applying any of the funds of the *Great Northern* Company to the payment or answering of the liabilities of the *Ambergate* Company in respect of the *Grantham* and *Nottingham* Canals, or any other liabilities of the last-mentioned Company, or in indemnifying the same Company against all or any of their liabilities, whether of canals or otherwise, or in or towards paying to the same Company such sum as would, after answering all expenses and liabilities, furnish a dividend of 4l. per cent. on the paid-up share capital of the same Company, or in paying under or in pursuance of the agreement of the 5th of May, 1852, or the arrangement intended to be thereby made, any other sum of money whatever to the same Company, or in applying for or endeavouring to obtain an Act of Parliament to ratify the said agreement or the arrangement intended to be thereby made, or any similar arrangement contained or to be contained in any deed that was then or might thereafter be prepared to carry out such arrangement, with or without any variations, additions, or modifications, consistent with the scope of such arrangement; and also from pledging the credit of the *Great Northern* Railway Company for all or any of the above purposes.

The motion for the injunction was made in the terms of the prayer.

Sir *W. P. Wood* and Mr. *Jessell* for the Plaintiffs.—The agreement, which the motion seeks to restrain the Defendants from carrying into effect, is, in fact, an attempt by one Company to purchase the rights which Parliament has conferred upon another, without the authority of Parliament. This is unlawful: *Beman v. Rufford* (a), *The Great Northern Railway Company v. The Eastern Counties Railway Company* (b). The agreement is, moreover, clearly an attempt to divert, or the prosecution of the agreement would amount to a diversion of, the funds of the Company to purposes other than those for which they were subscribed, which this Court will restrain: *Colman v. The Eastern Counties Railway Company* (c), *The Attorney-General v. Andrews* (d), *Munt v. The Shrewsbury and Chester Railway Company* (e), *The Attorney-General v. The Guardians of the Poor of Southampton* (f), *The Great Western Railway Company v. Rushout* (g).

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Mr. *Bethell*, Mr. *Rolt*, and Mr. *Denison*, for the Defendants.—The agreement is, in effect, to do no more than the legislature may sanction. The payment to be made to the *Ambergate* Company for the use of the line is nothing more than a toll, calculated in a special form; and such a toll is within the powers of the *Great Northern* Company to pay, and of the *Ambergate* Company to accept. Agreements of this nature between Railway Companies are provided for and sanctioned by the 87th section of the General Act (8 & 9 Vict. c. 20). That Act leaves the Companies entirely free to regulate the tolls, conditions, and restrictions upon which they are to pass over each other's railway as they may think most for their respective benefit. It is within the duties of the directors of the *Great North-*

(a) 1 Sim., N. S., 550.

(b) 9 Hare, 306.

(c) 10 Beav. 1.

(d) 2 H. & T. 431.

(e) 13 Beav. 1.

(f) 17 Sim. 6.

(g) 5 De G. & S. 290.

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ern Railway Company to take all necessary steps for successfully developing the undertaking for which the Company was constituted, and for that purpose to obtain any proper extension of their parliamentary powers. This authority is incidental to the office of directors of the Company: *The Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company* (a), *Ware v. Grand Junction Waterworks Company* (b), *Bright v. North* (c), *Stevens v. The South Devon Railway Company* (d), *Cohen v. Wilkinson* (e). There is no contest on the fact that the proposed arrangement will be beneficial to the *Great Northern* Company; there is no immediate mischief to be apprehended from proceeding with the arrangement in the interim; and the Court will not, in such a case, interpose on the application of one or two persons, who have, there is no doubt, other motives than those of seeking the benefit of the body on whose behalf they ostensibly sue.

Mr. Baile for the *Ambergate* Company.

Judgment.

VICE-CHANCELLOR:—

The first question to be considered upon this motion is, what are the general principles which ought to be applied to cases of this nature; and I take it to be well settled, that the principles which are to govern such cases between the members of large Companies, are the same as those which regulate the rights in ordinary partnerships. How, then, would this case have stood if it had been the case of an ordinary limited partnership?

Now, these Companies are formed for the special purpose of making railways between certain places, with

(a) 2 Ph. 597.

(b) 2 Russ. & My. 470.

(c) 2 Ph. 216.

(d) 13 Beav. 48.

(e) 12 Beav. 125.

power to carry passengers and goods between those places; and in the case of an ordinary partnership, formed for such purposes, I think it is clear that no majority of the partners could by any means bind the minority to make a railway, or to carry upon a railway between other and different places. If a partnership be entered into between a limited number of persons for the purpose of making a railway between certain points, and those persons are empowered to carry on the railway so to be made, I take it to be perfectly clear that no majority of the partners could bind the minority to make the railway between different points, or to extend that railway to different places, and to become carriers between the different places to which the railway might be extended. For example—suppose a contract between a limited number of persons to trade between *London* and *Oporto* in any particular description of merchandise, it would not be competent to any majority of the partners to bind the minority to trade between *London* and *Lisbon*, or between other and different places, though the trade were of the same nature and description.

Another illustration of the same principle was referred to in the argument,—that of horsing coaches, which, as it was said, is somewhat similar to the present case. Suppose a contract to be entered into between a limited number of persons to horse a coach between *London* and *Bath*, the majority of such persons could not bind the minority to horse the coach between *Bath* and *Exeter*. This is the general principle which must be applied in the case which is now before me.

If the case, therefore, rested here, I should feel no doubt upon the subject; but in applying the principle to which I have referred, it is necessary to consider all the terms of

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the partnership. Now the General Act (a) provides, that "it shall be lawful for the Company from time to time to enter into any contract with any other Company, being the owners or lessees or in possession of any other railway, for the passage over or along the railway, by the Special Act authorised to be made, of any engines, coaches, waggons, or other carriages of any other Company, or which shall pass over any other line of railway; or for the passage over any other line of railway of any engines, coaches, waggons, or other carriages of the Company, or which shall pass over their line of railway, upon the payment of such tolls, and under such conditions and restrictions, as may be mutually agreed upon; and for the purpose aforesaid, it shall be lawful for the respective parties to enter into any contract for the division or apportionment of the tolls to be taken upon their respective railways" (b). This being a general enactment applicable to all Railway Companies, every person who becomes a shareholder in such a Company must be considered as holding, and contracting to hold, those shares, subject to the provisions of this statute, and, therefore, it is necessary to consider what is the effect of the clause.

It is argued for the Plaintiffs, that the effect of that clause is merely to give to one Company a right to contract for passing over the line of another Company; and that it cannot give to any Company the right to take up and carry passengers and goods upon the line which is to be so passed over. This, I confess, appears to me to be a narrow construction of that clause of the Act of Parliament. The object of the clause is plainly to enable the trains of one Company to pass to the limits of the railway of another Company, so as to avoid the necessity of chang-

(a) Stat. 8 & 9 Vict. c. 20, (The Railways Clauses Consolidation Act).

(b) Sect. 87.

ing the trains at the point of terminus of each of several railways. That being the object of the clause, take the present case,—the *Great Northern* Railway stops at *Grantham*,—that is the point where the turn is intended to take place; supposing another railway to go on from *Grantham* to *York*, the object of this clause in the Act would be to enable the trains of the *Great Northern* Company so going to *Grantham*, to pass on from *Grantham* to *York*. That would be the precise object and effect of the clause; and if that be so, it must be within the contemplation of the legislature, that they might contract for the right to stop at stations on the line over which they are to pass; and if they are to be at liberty to stop as well as to pass, I think it would be exceedingly difficult to say that they are not also to be at liberty to take up passengers and goods at the points at which they are enabled and empowered to stop. I think it cannot be said, that, having the right to stop, they should not be able to contract for the right to take up passengers and goods. I think that “passing over” in the 87th section of the Railways Clauses Act, must be construed to mean passing, with the incidents which ordinarily attach to passing over, that is to say, the incidents of stopping and of taking up, at the points at which they do stop, both passengers and goods.

It was then argued for the Defendants, that this right of stopping and taking up passengers and goods was unlimited; and that they might bargain to carry the whole of the traffic of the railway over which they were empowered by agreement to pass. I think this argument goes too far also. The right, in my opinion, is a right to agree to pass over any other line of railway with the incidents of passing over; but not a right, under the colour of passing over another line of railway, to acquire the trade of the Company over whose lines they may agree to pass.

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The question, therefore, in this case, in the view which I take of it, must be this: whether the agreement between the two Companies is a *bonâ fide* agreement, entered into for the purpose of passing over another line of railway upon the terms prescribed in the Act, or is an agreement entered into between the Companies for another and a different purpose,—as for the purpose of acquiring the trade of the other Railway Company; and by that test I think the question as to the injunction upon the first two points must be tried.

Now, looking at the agreement itself, I entertain no doubt upon it. Its object is not merely to acquire the right of passing from *Grantham* to *Nottingham* over the line of the *Ambergate* Company, with the usual incidents of passing over, and of taking up and setting down passengers and goods, but it is to acquire the whole traffic of the *Ambergate* Company. This was clearly meant to be the result when the Act should be obtained; and the agreement draws no distinction between what is to take place before the obtaining of the Act and what is afterwards to take place; and therefore, looking at the agreement itself, I entertain no doubt that this is not an agreement entered into for the *bonâ fide* purpose of merely acquiring the right to pass over the *Ambergate* Railway, within the meaning of the 87th section of the Act.

The Defendants, however, feeling probably the difficulty of maintaining the case upon the agreement itself, state by their affidavits what it is their intention to do before the passing of the Act, and they state, “that it is the intention of the *Great Northern* Railway Company, from the 1st of July next, until an Act of Parliament can be obtained, to work the trains of the *Great Northern* Railway Company, which shall pass over the lines of the Company contiguous to the lines of the *Ambergate* Company, over



the line of the *Ambergate* Company, in conformity with such rules and regulations as have been or shall have been laid down or established by the *Ambergate* Company; and to carry, by means of the same trains, as well the traffic of the *Great Northern* Railway, as also such of the traffic of the *Ambergate* Company as can be conveniently conveyed and accommodated by the same trains, leaving the *Ambergate* Company in the control over and management of their line, and to work all other traffic on their line; and that the *Great Northern* Railway Company shall pay to the *Ambergate* Company in respect of such passage of the trains of the *Great Northern* Railway Company over and along their said railway, and in respect of the traffic thereby conveyed, such toll as will, when added to the profits to be derived by the *Ambergate* Company from all other traffic and sources, after answering all expenses and annual liabilities, furnish a dividend after the rate of 4l. per cent. per annum on the paid-up share capital of the *Ambergate* Company."

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This statement possibly might vary the case, or at least induce the Court to qualify any injunction which it might think proper to grant, if the agreement were in other respects within the powers of the Act of Parliament; but, in my opinion, this agreement is not in other respects within the powers of the Act. The Act enables two Companies to agree for the one to pass over the line of the other, "upon the payment of such tolls, and under such conditions and restrictions, as may be mutually agreed upon;" but, in my opinion, what is agreed to be paid here is not toll within the meaning of the Act. The agreement is, that there shall be a payment of such an amount as will, after answering all expenses and liabilities, furnish a dividend of 4l. per cent. on the paid-up share capital of the *Ambergate* Company. Tolls, as defined in the dictionaries, are "dues receivable for the liberty of passing over high-

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 —  
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ways, public or private;" they are payments connected with the passing over, and are therefore, I think, to be measured by it. Upon this point, my attention was invited to the expression "tolls" in the Act, and to the difficulty which exists in determining what is the true meaning of the word "tolls" in the 87th section. I perfectly agree, that it is very difficult to say how the tolls are to be fixed within the meaning of that section; and it is not necessary for the present purpose to decide that question. It is sufficient for the present purpose to say, that I am of opinion that this mode of payment is not a toll within the meaning of the Act of Parliament.

Tolls within the meaning of the Railways Clauses Consolidation Act, should be fixed with reference to the number of carriages of one Railway Company which pass over the line of another Railway Company, under the terms of the agreement between the two Railway Companies,—*Sembla.*

If I were called upon to give any opinion upon that subject, I should, as at present advised, say, that what was meant by the Act was, that the tolls should be fixed with reference to the number of carriages which pass over the railway under the terms of the agreement,—the payment being for their passing over the railway, both by the expression of the clause, and also by force of the word "toll," which of itself imports a due for passing over. I do not, however, mean to prejudice that question whenever it may arise. I have merely thrown out that consideration in order that the parties, if they are under any difficulty, may consider whether the Act will or will not bear that construction. All I can say upon the subject is, that I am very clearly of opinion that this is not a toll within the meaning of the statute.

The result, therefore, is, that the agreement which has been entered into between the two Companies is not within the meaning of and is not warranted by the statute; and that, independently of the statute, it could not be a valid agreement: and I am of opinion, therefore, that the injunction is due upon the first two points; qualifying, however, the first part of the injunction by adding the words

"under or in pursuance of the agreement, or of any arrangement which may be consequent thereon."

The second part of the injunction does not require that qualification; for, according to the view which I take of the case,—this not being a toll within the meaning of the Act,—the *Great Northern* Railway Company can have no right to pay any of the liabilities of the *Ambergate* Company.

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 —  
*Judgment.*

The remaining part of the injunction—the third head—is, as to the right of the *Great Northern* Railway Company to apply their funds in payment of the expenses incident to an application to Parliament for the purpose of carrying out this arrangement; and upon that subject the case of *Ware v. The Grand Junction Water Works Company* (a) was very properly relied upon on the part of the Defendants; but, upon carefully reading that case, I do not observe that the distinction between going to Parliament and applying the funds of the Company for the purpose of going to Parliament, appears to have been much, or indeed at all, considered. The point does not seem to have been called to Lord Brougham's attention; but the latter cases have, I think, very clearly established that distinction,—a distinction which is, in my opinion, perfectly well founded. I will test it by again applying the principle which governs the case of a limited partnership. Could one partner be permitted to use the funds of a partnership in an application to Parliament to authorise the extension of the trade beyond the limits prescribed by the articles? It is perfectly clear that he could not; and if this could not be done by a partner in a limited partnership, extending the principle to these large partnerships, I am of opinion that all the members cannot, as against one dissentient, agree that the

(a) 2 Russ. & My. 470.

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 —  
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funds of the Company shall be applied to a purpose not warranted or provided for by the articles. If this were the case of an agreement between parties for the purpose of carrying on, not a particular trade between particular places, but a general trade in particular articles, I should be disposed to say, that the effect would be that the majority of the partners, all having agreed to carry on the trade in those articles, could bind the minority as to the places between which that trade was to be carried on. Where, however, the partnership specifically provides for carrying on the trade between certain limits, I take it, that no majority could bind the minority to carry it on between different limits. I think, therefore, no majority can authorise an application of partnership funds to a purpose not warranted by the partnership contract.

A distinction was attempted in the present case between an application to Parliament for the purpose, as it was said, of carrying out the purposes of the partnership, and an application to Parliament for another and different purpose than the purposes of the partnership. But this distinction appeared to me during the argument, and upon further consideration it still appears to me, to be founded altogether upon a fallacy; for the purpose of the partnership is not carrying on and making all railways, or carrying goods and passengers upon all railways, but the purpose is the making a particular railway and carrying upon that particular railway. It is, therefore, a limited purpose; and the intended application is for another and a different purpose from that which is prescribed by the Act under which the Company is formed, and which constitutes the partnership deed of the Company. I am of opinion, therefore, that the injunction is also due upon this point, but not to the extent to which it is asked. Instead of restraining the use of the monies of the Company "in applying for &c." (a), I think

(a) *Supra*, p. 52.

it should be "in applying for and endeavouring to obtain an Act of Parliament to ratify the said agreement, or the arrangement intended to be made thereby; and also from pledging the credit of the *Great Northern Railway Company* for all or any of the above purposes."

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GRIEVES v. RAWLEY.

July 10th &  
 17th.

IT was referred to the Master to inquire who were the nephews and nieces of the testator, *Joseph Grieves*.

The description of nephews and nieces includes the child of a brother or sister of the half blood.

It appeared that the testator's father, *John Grieves*, married *Jane*, the widow of one *Thomas Scott*, by whom he had three children, *James*, *William*, and *Joseph* the testator. *James* and *William* died leaving children, who were living at the death of *Joseph* the testator. *Jane*, the mother, had a son, named *John Scott*, by *Thomas Scott*, her first husband. *John Scott*, the half brother of the testator, had one child, *Mary Scott*, who survived the testator.

The Master found that the nephews and nieces of the testator were the children of *James* and *William*, his brothers of the whole blood, and also *Mary Scott*, the child of *John Scott*, his brother of the half blood. The nephews and nieces of the whole blood excepted to the report in respect of *Mary Scott*.

Sir W. P. Wood and Mr. Southgate for the exception.— There are persons who strictly and properly answer the description of nephews and nieces; and the general principle of law applies, that other persons, not entirely within that description, cannot be introduced into the class:

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thus, a great-niece cannot take under a gift to nephews and nieces, where there are nephews and nieces to whom the word is applicable: *Shelley v. Bryer* (a). The term "grandchildren" does not include "great grandchildren," *Lord Oxford v. Churchill* (b); "children" does not include "grandchildren," *Radcliffe v. Buckley* (c); and "first cousins or cousins german" do not include the descendants of a first cousin: *Sanderson v. Bayley* (d). The definition of a "brother," in Dr. Johnson's Dictionary, is, "one born of the same mother and father;" sister, "a woman born of the same parents, correlative to brother;" nephew, "the son of a brother or sister;" niece, "the daughter of a brother or sister." *Mary Scott* is only a half niece, and could not, in accurate language, be otherwise described with reference to the testator.

Mr. *Heberden* for *Mary Scott*, in support of the Master's report.—It is very clear, that the term "niece" includes a niece of the half as well as of the whole blood. It would be so considered in common intent, and there is no authority against it; on the contrary, all that can be found on the point is in favour of comprehending the half blood: *Earl of Winchelsea v. Norcliffe* (e), *Doe d. Thwaites v. Over* (f).

Judgment.

VICE-CHANCELLOR.—

The strict question to be decided in this case is, whether the daughter of a half brother is a niece of the testator within the meaning of the decree. Decrees must, I apprehend, be construed according to the generally understood meaning of the words which are used in them. The question, therefore, is, whether the child of a half brother or sister is a nephew or niece within the generally understood

(a) Jac. 207.

(b) 3 V. &amp; B. 59.

(c) 10 Ves. 195.

(d) 4 My. &amp; Cr. 56.

(e) 1 Vern. 437.

(f) 1 Taunt. 263.

meaning of the words. I think the question must be answered in the affirmative.

In the description of nephews and nieces, there is not, I think, any distinction generally made between children of whole and of half brothers and sisters. The relation of uncle and nephew or niece is of course founded on and derived from the relation between the uncle and the parent of the nephew or niece, but the first-mentioned relation is so generally recognised and understood, that, in speaking of it, the nature and degree of the second-mentioned relation is not, I think, generally regarded. It would for instance, as I conceive, be a great surprise in any one to be told, that the child of his half brother or sister was not his nephew or niece.

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*Judgment.*

The argument on the part of the exceptant was, that the nephew or niece must be a child of the brother or sister, and that the relation of brother and sister subsists only where both the parties are descended from the same father and mother, and not where one of the parties has a different father or a different mother; and it is true, that the dictionaries so describe the relation of brother and sister; but this argument appears to me to be open to two objections: in the first place, it goes to the origin of the relation, for the purpose of defining a class which is generally recognised and defined independent of its origin; and, in the second place, it assumes that the meaning which is attributed to the term brother and sister in the dictionaries, is the meaning in which the term is ordinarily used; and I do not think this is the case. I think that, in general, when a man speaks of his brothers and sisters, he speaks of them, not with reference to the definition of the word in the dictionary, but as a class, standing in the same relation to one or both of his parents as he himself stands in. Though not descended from the same parents,

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*Judgment.*

the parties are, as is said in the "*Termes de la Ley*" (a), "after a sort brothers," "brothers by the father's side," "brothers by one mother;" and, however other parties might describe them, or they designate themselves, if required to give a precise description of the nature and degree of the relation subsisting between them, I think that, in ordinary parlance, they would be called, and would call themselves, brothers and sisters. Suppose, for instance, A., a member of a family consisting of sons and daughters of the father by different marriages, was asked the question as to the relation between him and B., another member of the same family, would not the question be—Is B. your whole brother or sister, or your half brother or sister; and would not the answer be in similar terms? Both the party questioning and the party questioned would thus call B. a brother or sister, but each would distinguish the character and degree of the relation.

It was pressed in support of the exception, that, if there were persons accurately answering the description contained in the will, others who did not accurately answer it could not be let in; and I agree to the argument: but I do not think it applies to the present case. It assumes, that the description contained in the will is of nephews and nieces of the whole blood, and of the whole blood only. For the same reason, I do not think that the cases cited by the exceptant govern the present case; but I think the case of *Cotton v. Scarancke* (b), to which I referred in the course of the argument, and which is in favour of the conclusion at which I have arrived, goes far to decide it. I am of opinion, therefore, that the exception must be overruled.

(a) Page 123, tit. Half Blood (*Demy Sangué*).

(b) 1 Madd. 45.



1852.

## ONSLOW v. LORD LONDESBOROUGH.

March 10th.  
Aug. 6th.

A SPECIAL case.—The question was, whether a covenant for the production of title deeds, stipulated for and agreed to be given by articles of agreement for the sale of an estate called “the *Routh* estate,” ought to be entered into by the Defendant Lord *Londesborough*, or by the other Defendants Sir *William Meredith Somerville*, *Henry Frederick Stephenson*, and *John Benbow*.

An agreement on the sale of an estate, that the title deeds should be delivered to the purchaser on the completion of the contract; but, as the deeds related also to other property belonging to the vendors, the purchasers should enter into, or procure to be entered into, one or more proper and sufficient covenant or covenants with the vendors for the production and delivery of copies of such deeds. The purchasers were trustees, and entered into the contract in pursuance of the directions in the will of their testator, for the investment of his personal estate in the purchase of lands, to be settled to certain uses creating estates for life, with remainder

By indentures of lease and release and settlement, the release and settlement being dated the 19th of September, 1816, two estates, called “the *Risby* estate” and “the *Routh* estate,” were conveyed to *Arthur George* Earl of *Onslow*, one of the Plaintiffs, and *John Hall*, their heirs and assigns, to the use of trustees, for a term of 1000 years, upon trust for raising certain monies for the purposes in the settlement mentioned, and subject thereto to the use of *Edward Mainwaring Onslow*, for his life, with remainders over. And in the same settlement was contained a covenant for the surrender of certain copyhold estates to the use of *Arthur George* Earl of *Onslow*, and *John Hall*, their heirs and assigns, upon the trusts declared thereof by the same settlement. By a deed of the 19th of June, 1835, the Plaintiff *James Middleton Hall* was appointed a trustee of the settlement in the place of *John Hall*, deceased. The Plaintiffs Lord *Onslow* and *John Middleton Hall* were admitted to the copyhold estates comprised

over in strict settlement. The estate was conveyed by the vendors to the purchasers to the uses declared by the will of their testator:—*Held*, that the agreement to enter into a proper and sufficient covenant for the production of the deeds, did not mean that the vendors should be entitled to a covenant which would secure to them their production at all times and under all circumstances; that the word ‘sufficient’ was connected with the word ‘proper’; that the extent and sufficiency of the covenant must in a great degree depend on the mode in which the conveyance was taken; that releases to uses do not stand in a worse position than trustees, who, according to the ordinary rule of the Court, are required to covenant for their own acts only; and that the Court would not compel the purchasers, who were only releasees to uses,—especially after the uses were executed by the estate,—to enter into such covenants.

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 }  
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 v.  
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 BROUGH.  
 Statement.

in the settlement of 1816, upon the trusts declared by that settlement.

The *Routh* and the *Risby* estates comprised in the settlement of 1816 having been subject to incumbrances, which were raisable by means of the term of 1000 years, and which could not be raised otherwise than by means of that term, a private Act of Parliament was obtained in the 9th of the Queen, by which the *Routh* estate, and the inheritance thereof in fee simple, were vested in the Plaintiffs *Thomas Crawley Onslow* and *George Augustus Crawley Onslow*, their heirs and assigns, freed and absolutely discharged from the uses, trusts, limitations, provisions, and declarations of the settlement of 1816, upon trust, with the consent of *Edward Mainwaring Mainwaring Ellisker Onslow*, during his life, and, after his decease, with such consent as in the said Act mentioned (but subject and without prejudice to the several mortgages and other charges thereon and raisable thereout, under the trusts of the term of 1000 years), to sell the *Routh* estate, or such part or parts thereof as the said trustees or trustee should, in their or his discretion, with such consent as aforesaid, from time to time think proper, and to make, do, and execute all such acts, deeds, conveyances, surrenders and assurances, matters, and things whatsoever, as should be requisite or proper for the purpose of effectuating and completing such sale or sales.

In pursuance of the trust created by this Act of Parliament, the Plaintiffs, *Thomas Crawley Onslow* and *George Augustus Crawley Onslow*, on the 6th of August, 1850, agreed to sell the estates comprised in the Act to the Defendants *Sir William Meredith Somerville*, *Henry Frederick Stephenson*, and *John Benbow*; and it was upon this agreement, taken in connection with the conveyances made under it, that the question in the present case arose.

The agreement recited, that the vendors, as trustees named in the Act of Parliament, had contracted with the purchasers for the absolute sale to them of the *Routh* estate, with the appurtenances and the advowson of the rectory of *Routh*, and the several messuages and hereditaments thereafter mentioned, in fee simple, free from incumbrances (except as thereafter mentioned) at the price of 69,000*l.*, inclusive of the timber thereon, and the landlord's improvements; and it was thereby agreed between the vendors and purchasers, that the title deeds and documents relating to the said manor, advowson, messuages, and hereditaments, which were in the possession or power of the vendors, should, upon the completion of the said sale, be delivered to the purchasers; but as the same also related to other estates belonging to the vendors, the purchasers should enter into, or procure to be entered into, one or more proper and sufficient covenant or covenants with the vendors or such other persons as they might direct, for the production and delivery of copies of the said deeds and documents; and that the costs of any such deed or deeds of covenant as aforesaid should be paid by the vendors.

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Statement.

The Defendants, Sir *William Meredith Somerville*, *Henry Frederick Stephenson*, and *John Benbow*, were trustees under the will of Mr. *Denison*, who died on the 2nd of August, 1849, having by his will, dated in August, 1848, devised all his estates in the counties of *York* and *Surrey* to the use of his nephew Lord *Londesborough*, and his assigns, for his life, without impeachment of waste, with divers remainders over in strict settlement; and in the said will was a proviso, that if any person, whom the said testator had made tenant in tail of the estates thereafter directed to be purchased with his (the testator's) residuary personal estate, was or were then born, or should thereafter be born in his lifetime or in due time after his decease, the estate

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or several estates in tail male thereby devised to each such person should cease, and in lieu thereof the said testator devised the manors and hereditaments therein mentioned, for such estate in tail male, to the person respectively whose estate in tail male should so determine, for his life, without impeachment of waste, with remainder to the use of his first and every other son successively according to their respective seniorities in tail male; and for the purpose of preserving the contingent remainders thereinbefore created, the testator devised all the hereditaments thereinbefore devised to the use of any person during his life, from and after the determination of that estate by any means in his lifetime, to the use of the Defendants, Sir *William Meredith Somerville*, *Henry Frederick Stephenson*, and *John Benbow*, and their heirs, during the life of the tenant for life whose estate should so determine, in trust for him, and by the usual ways and means to preserve the contingent remainders expectant or dependent thereon. And the testator gave the residue of his personal estate unto Sir *William Meredith Somerville*, *Henry Frederick Stephenson*, and *John Benbow*, their executors, &c., upon trust, after payment of his debts and legacies, within the space of ten years after his decease, or sooner, if his trustees could find a proper purchase or purchases, to lay out the residue of such monies in the purchase of estates in fee simple, in *England*, *Wales*, *Scotland*, or *Ireland*, of a clear and indefeasible estate of inheritance; or of any copyhold or leasehold lands or tenements convenient to be held therewith, but not exceeding the proportion therein mentioned, and to settle and assure the estates so to be purchased as last directed, to the uses and for the trusts and subject to the powers and declarations in the said will expressed concerning his estates in *York* and *Surrey*. The testator died in August, 1849. Lord *Londesborough* was now in the actual possession or receipt of the rents of the devised estates.

The purchase agreement of the 6th of August, 1850, was, so far as respects the conveyance of the *Routh* estate, completed by deeds of January, 1851; by which that estate was conveyed to Sir *William Meredith Somerville*, *Henry Frederick Stephenson*, and *John Benbow*, to the uses declared by the will of Mr. *Denison*; and the title deeds were, in pursuance of the agreement, delivered to Sir *William Meredith Somerville*, *Henry Frederick Stephenson*, and *John Benbow*, as purchasers. The Plaintiffs required Sir *William Meredith Somerville*, *Henry Frederick Stephenson*, and *John Benbow*, the releasees to uses in the conveyance of January, 1851, to execute a proper deed of covenant for the production of the title deeds; but they declined to enter into such covenant themselves, and, with the assent of Lord *Londesborough*, the legal tenant for life under the uses of the same conveyance, offered that such covenant should be entered into and executed by him.

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ONSLOW  
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Statement.

Mr. *Daniel*, for the Plaintiffs, the vendors.—The covenant by Lord *Londesborough*, the tenant for life, would not run with the land, and would not be sufficient; and the vendors were entitled to a covenant by the purchasers, the trustees of Mr. *Denison's* will, to whom the conveyance had been made.

Argument.

Mr. *Rolt*, for the purchasers.—The argument for the Plaintiffs, in order to establish their title to the covenant by the releasees to uses, ought at least to establish, not only that the covenant by the tenant for life will not bind the estate, but also that the covenant of the releasees to uses will have that effect. They have no estate. A covenant by them would not run with the land, and would not therefore give the Plaintiffs the benefit of the security which they claim. The argument, however, proceeds on the assumption that the vendors are entitled to a covenant that will for all future time bind the parties in whom the estate

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Argument.

may be vested. The agreement does not go to that extent. It must be construed with reference to the situation of the parties who are purchasers, and to the form of the conveyance which they may take; and, in the circumstances of this case, the vendors are entitled to the covenant of the tenant for life only: *Jenkin v. Peace*(a), *Barclay v. Raine*(b), *Riddell v. Riddell*(c), *Roach v. Wadham*(d), *Ford v. Peering*(e), *Keppell v. Bailey*(f), *Spencer's case*(g), Sugden's Vend. & Pur. 336, Conc. Edit.

Judgment.

VICE-CHANCELLOR:—

The first question to be considered in this case appears to me to be, what is the meaning of the words "one or more proper and sufficient covenant or covenants," contained in this agreement, and particularly, what is the meaning to be attached to the word "sufficient?" Was it meant to import that the vendors were to have a covenant or covenants, which, at all times and in all circumstances, should secure to them the production of the deeds, or merely that the vendors should have such a covenant or covenants, as, according to the ordinary practice and the views of this Court, would be deemed to be sufficient? This, I think, must be determined by the context of the agreement;—and seeing that the word "sufficient" is connected with the word "proper;" that, according to the provisions of the agreement, it was to rest with the purchasers to whom and in what manner the conveyance was to be taken; and that the extent and sufficiency of the covenant must, in a great degree, depend upon the mode in which the conveyance might be taken;—I think that

(a) 6 M. &amp; W. 722.

(b) 1 S. &amp; S. 449.

(c) 7 Sim. 529.

(d) 6 East, 289.

(e) 1 Ves. jun. 76.

(f) 2 My. &amp; K. 517.

(g) 5 Co. 16; 1 Smith's Lead.

Cas. p. 27, n.

the word "sufficient," as used in the agreement with reference to this covenant, must be taken in the more limited, and not in the extended sense, to which I have referred. It must be taken to mean "sufficient" with reference to the agreement and the conveyance to be made under it. The unqualified stipulation that the deeds should be delivered to the purchasers, and the embarrassment which might arise to them if the word "sufficient" was to be construed in the unlimited sense contended for, seems to me to confirm this view of the case.

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 —————  
*Judgment.*

Assuming, then, the construction which I have put upon the agreement to be correct, the next question to be considered is, what, according to the ordinary practice and the views of this Court, would have been the covenant or covenants for production to be entered into or procured to be entered into by the purchasers upon a conveyance which they had a right to require and had required to be made to the uses of Mr. *Denison's* will. Would this Court, if it had been called upon to execute the agreement, have required the releasees to uses to enter into the covenant or covenants for production? It is contended on the part of the Plaintiffs, the vendors, that the covenant would have been to be entered into by the releasees to uses, because it is said it would then have run with the land. Whether the burthen of a covenant or covenants so entered into would have run with the land or not, is, in my opinion, a very nice and difficult question, on which, had it been necessary to decide it, I should have thought it right to require the assistance of a common law Judge. But I do not think it is necessary to decide that point. The true question in this view of the case would, in my opinion, have been, not whether the covenant or covenants entered into by the releasees to uses would have run with the land, but whether the vendors conveying, as they were bound to do, to the uses

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of Mr. *Denison's* will, could have required the releasees to uses to enter into such a covenant or covenants. I am of opinion that this Court would not have compelled the releasees to uses to enter into such a covenant or covenants.

The ordinary practice and the ordinary rule of the Court is, that trustees covenant against their own acts only; and I do not think that releasees to uses can be considered to stand in a worse position than trustees.

It may be said, that the trustees of Mr. *Denison's* will, being themselves the releasees to uses, the right to the covenant from them would depend upon their agreement, and not upon any ordinary practice or rule; but, in addition to what I have already observed upon this subject, it is to be remembered that the agreement is to enter into the covenant, or procure it to be entered into; and, suppose other persons had been named in the conveyance as the releasees to uses, could Mr. *Denison's* trustees have been compelled to procure, and could they have procured, those other persons to enter into the covenant?

There are two most important considerations connected with this view of the case—the liabilities which would be consequent upon the covenant, and the rights of the cestui que use under Mr. *Denison's* will. As to the liabilities consequent upon the covenant,—suppose the deeds to be lost or destroyed, would not the releasees to uses be liable in damages, and how are those damages to be recouped to them? The statute has executed the use, and they have no estate to answer the damages; and, as to the rights of the cestui que use under Mr. *Denison's* will, I think, that, notwithstanding some early cases upon the subject, the cestui que use would probably now be held entitled at law to the deeds; and, at all events, this would be a question. And would this Court place the releasees to uses in this position, that they should be liable to be sued at law by the



cestui que use for detaining the deeds, and should be driven to assert in this Court an equity to retain them upon the ground of the covenant into which they had entered? It is not, I think, even clear that such an equity would hold, at least in favour of the trustees themselves, taking them to be the releasees; for the equity would arise out of the contract, and it might perhaps be said, that it was a breach of duty in them to have so contracted as to have deprived the cestuis que use of their legal right. I think, therefore, that this Court would not have compelled the releasees to enter into this covenant for production. Whether it would have enforced the contract at all if the vendors could not obtain a covenant for production running with the land may be another question; but it is unnecessary to consider this, as the contract has been completed as to the estate by conveyances; and this brings me to a point which appears to me to be decisive upon the question submitted by this case. These estates have been conveyed to legal uses. The statute has executed those uses. The legal estate has passed to Lord *Londesborough*, and the subsequent uses, so far as they are in esse, are served. How can any covenant, entered into by the releasees, who have not the legal estate, run with the land? Suppose the conveyance had been taken to the trustees themselves, and they had conveyed to the uses of Mr. *Denison's* will,—no covenant for production entered into by them after they had conveyed, could, as I conceive, have run with the land; and I do not see how the case is differed by the circumstance of the estate passing by the operation of the statute and not by the conveyance of the trustees. Under the circumstances of this case, therefore, I am of opinion that the Plaintiffs, the vendors, must be satisfied with the covenant of Lord *Londesborough*; and I must declare accordingly.

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*June 3rd,  
July 17th.*

Where the tenant in fee or in tail of an estate becomes entitled to a charge upon the same estate, the general rule is, that the charge merges, unless it be kept alive by the party entitled to it; and where the merger of the charge would have let in other charges in priority, thereby rendering it the interest of the owner of the estate to keep alive his charge, the Court presumed that such was his intention, notwithstanding the absence of any other indication of such intention.

## GRICE v. SHAW.

**A CLAIM.**—*John Briggs*, by his will, dated in 1821, gave to trustees, to the use of them and their heirs, his freehold messuage and tenement at *Kisken*, in *Cumberland*, upon trust to pay a yearly sum of 10*l.* for the benefit of the children of his daughter *Mary Briggs*, and to divide 200*l.* between such children in manner therein mentioned. And in case of the death of *Mary Briggs* without leaving issue, then upon trust to pay the said sum of 200*l.* equally between and amongst all and every his granddaughters, the daughters of his daughter *Ann*, the wife of *Thomas Grice*, as tenants in common; the interest of their respective shares to be applied for their respective benefits. And upon further trust, that his trustees should, at the end of six calendar months next after the decease of his daughter *Mary Briggs*, pay the sum of 200*l.* unto and equally between his granddaughters, the daughters of *Thomas Grice* and of his said daughter *Ann* his wife, or as soon after the decease of his said daughter *Mary* as they should severally attain the age of twenty-one years or marry; and if any of them should be under age or unmarried at the decease of his daughter *Mary Briggs*, the interest of their respective presumptive shares to be paid for their benefit respectively until such shares should be paid. And the testator declared his will to be, that his said messuage, tenement, and premises, should be subject and liable to and charged and chargeable with the payment of the said yearly sum of 10*l.*, and the said two several sums of 200*l.*, as well as certain thereinbefore mentioned annuities, to his said daughter *Mary Briggs*; and subject thereto upon trust as to his said messuage and tenement for his daughter *Ann*, the wife of *Thomas Grice*, for her life; and from and after

her decease, upon trust that his trustees should (in case his grandson *George Grice* should survive his mother *Ann*, the daughter of the testator,) raise, borrow, and levy the sum of 200*l.* by mortgage of his said messuage or tenement, and should pay the sum of 200*l.* to his said grandson *George Grice* for his own use, or as soon afterwards as he should attain the age of twenty-one years. And after directing that the receipt of his trustees should be a sufficient discharge for such mortgage money, the testator declared, that, subject as aforesaid, the trusts as to his said messuage and tenement should be for his said grandson *George Grice* for his life, and, from and after his decease, then in trust for the heirs of his body.

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 —  
*Statement.*

The testator died in September, 1826; *Mary*, his daughter, died in 1834, unmarried; *Ann*, the other daughter, died, in 1842, having had three daughters, *Elizabeth*, *Hannah*, and *Mary*, and one son, the said *George Grice*, all of whom were living at the decease of the testator. *George Grice* thereupon became tenant in tail of the estate, and became entitled also to the sum of 200*l.*; and the three daughters of *Ann* became entitled to the other sums of 200*l.* and 200*l.* *George Grice* died in April, 1850, leaving *John* his eldest son, and leaving also other children, and having by his will, dated in 1850, bequeathed to his wife and another, upon trust for the maintenance and education of his family, all his property, of whatsoever kind, after paying his debts, and "after this to be applied as follows:" and he gave and bequeathed to his eldest son *John Grice* the estate called *Kiskin*, and all property which might have accumulated or stock, of whatsoever sort, when his said son should come to the age of twenty-six years. Should his mother and uncle think it prudent to allow him to take possession of the land before this time, they could do so; and the testator bequeathed legacies of 400*l.* each

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*Statement.*

to his sons *Thomas* and *James*, and a like legacy to his daughter, to be paid when they should come to the age of twenty-one; and he directed that if either *Thomas*, *James*, or *Ann* should die before that time, their share or shares should be equally divided amongst his children then living, including *John Grice*; and he gave to his wife *Ann Grice*, should she remain a widow, 40*l.* a-year, to be paid when his eldest son was twenty-six, as follows:—*John Grice* to pay 16*l.*, *Thomas Grice* to pay 8*l.*, *James Grice* 8*l.*, and *Ann Grice* to pay 8*l.* per year.

Upon the death of *George Grice*, *John* his eldest son became tenant in tail of the estate. The claim was filed by *John Grice* against *John Shaw*, the surviving devisee under the will of the testator *John Briggs*; against *Elizabeth*, *Hannah*, and *Mary*, the three granddaughters of the testator; and against the executors and trustees under the will of his father *George Grice*,—stating, that the two sums of 200*l.*, given by the testator *John Briggs* to his said granddaughters the daughters of *Ann*, had not been paid, although interest had been paid upon them; and stating, also, that the 200*l.* given by the same testator to *George Grice* had never been raised; and that the Plaintiff was advised that it had merged for the benefit of the inheritance; but that the executors of *George Grice* claimed to be entitled to it as part of his personal estate. The claim prayed that the two sums of 200*l.*, payable to the daughters, might be raised and paid, and that the 200*l.* given to *George Grice* might be declared to have merged for the benefit of the inheritance, or that it might be raised and paid to his executors.

*Argument.*

*Mr. Bailly* appeared for the Plaintiffs; and

*Mr. Pole* and *Mr. J. B. Allen* for the several Defendants.

The cases cited were *Kirkhan v. Smith* (a), *Forbes v. Moffatt* (b), *Astley v. Milles* (c), *Wigsell v. Wigsell* (d), *Drinkwater v. Combe* (e), and *The Earl of Buckinghamshire v. Hobart* (f).

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Argument.

VICE-CHANCELLOR:—

I am of opinion that the sum of 200*l.* given by the will of the testator to *George Grice*, must be raised out of the estate. The general rule indeed is clear, that, where a party has an estate in fee or in tail, and at the same time a charge upon the estate, the charge will merge. The cases of *Donisthorpe v. Porter* (g), and *Lord Compton v. Oxenden* (h), are strong instances of this rule. But the law does not, of course, prevent the party entitled to both the estate and the charge from keeping alive the charge; and the rule, therefore, yields to the intention, whether it is expressed or to be presumed. In the present case, there is certainly no expressed intention to keep alive the charge. There is nothing before the Court which can indicate any intention on the subject, except the will of *George Grice*; and, so far from any intention to keep alive the charge being indicated by the will, I have doubted whether it does not indicate an intention to merge it. The devise of the estate without mention of the charge would seem to tend to that conclusion; but this is answered by the observation, that there is no mention of the other charges in favour of the granddaughters, to which, of course, the devise must be subject; and I think, therefore, that no conclusion can properly be drawn from the devise contained in

Judgment.

(a) 1 Ves. 258.

(b) 18 Ves. 384.

(c) 1 Sim. 298, 343.

(d) 2 S. & S. 364.

(e) Id. 340.

(f) 3 Swanst. 186.

(g) 2 Eden, 162.

(h) 2 Ves. jun. 261.

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the will of *George*, that the testator intended the charge to merge.

The question then is, what is the intention to be presumed with reference to this charge? Now, it is clear, that, if the testator merged this charge of 200*l.*, the two other charges of sums of 200*l.* in favour of the grand-daughters would take, to that extent, priority over the estate of *George*; and it follows, therefore, that it was the interest of *George* to keep alive the charge of 200*l.* to which he was entitled. This brings the case within the principle of *Forbes v. Moffatt* (a), a case which was followed in *The Earl of Clarendon v. Barham* (b); and, applying the principle adopted in those cases, I think this sum of 200*l.* must be raised.

The case of *The Earl of Buckinghamshire v. Hobart* (c), cited on the part of the Defendants, has nothing to do with the present question. It depended on totally different principles.

(a) 18 Ves. 384. (b) 1 Y. & C. C. C. 688. (c) 3 Swanst. 186.

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## HARMAN v. RICHARDS.

THE Plaintiffs filed their bill as creditors upon the estate of *John Richards* the elder, for the administration of his estate, and to set aside a settlement made by him, dated the 20th of January, 1846. The debt upon which the Plaintiffs sued was thus constituted: In September, 1844, *John Richards* the younger, the son of *John Richards* the elder, contracted to purchase *White Knight's* estate from *Sir J. L. Goldsmid* and *John Alkiston*, for 29,700*l.* In December, 1844, the estate was duly conveyed to him; and on the 13th of that month he mortgaged it to *Sir J. L. Goldsmid* for 20,000*l.* On the same day he mortgaged the equity of redemption of the estate to the Plaintiffs for 10,000*l.*, advanced by them to him, and payable in three months; and in this mortgage his father, *John Richards* the elder, joined, and the father and son entered into a joint and several covenant for payment of the 10,000*l.* and interest. The father also conveyed some ground rents at *Notting-hill*, and charged a mortgage for 1500*l.*, as collateral securities for the 10,000*l.* and interest. By the sale of the ground rents and payment of the mortgage of 1500*l.*, the debt to the Plaintiffs was reduced by 4500*l.* In the end of 1846, *John Richards*, the

*July 27th,*  
*28th;*  
*Nov. 3rd &*  
*4th;*  
*Dec. 2nd.*

The question, whether several deeds are part of the same transaction, or are separate and distinct transactions, depends on the surrounding circumstances, and not simply upon the fact whether the deeds are, or are not, by express reference grafted into or connected with each other.

Evidence of surrounding circumstances on which the Court held a settlement, that standing alone would have been fraudulent against creditors, to be connected with and part of the same transaction with several purchase-deeds

of even date, to which some only of the same persons were parties.

The release and assignment by a married woman of her life interest in her separate estate, although fettered by a restriction against anticipation, was held to form a consideration for a settlement by another person; for, though the married woman could not pass her future interest, she might and did thereby release her past income: and the question of consideration moreover depended, not upon the point whether her assignment passed her interest, but upon the question whether her concurrence enabled the settlement to be made.

An agreement by a creditor not to take proceedings against the debtor during his life, nor against the debtor's estate during the life of his wife, if she should survive him, construed (as to the latter clause) to mean that any beneficial interest which the wife might take in the property of the husband should not be disturbed during her life, and not to be an agreement that the creditor should be debarred from suing the personal representative of the husband; and therefore the creditor obtained a decree for an account against the wife as the personal representative of the husband, with a declaration that the interest of the wife was not to be disturbed during her life.

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 {  
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 v.  
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 —  
*Statement.*

son, became bankrupt, and the *White Knight's* estate was sold under his bankruptcy to Sir *J. L. Goldsmid* for less than the amount due upon his mortgage; so that the balance of the 10,000*l.* and interest remained due to the Plaintiffs upon the covenant only. *John Richards* the elder died in May, 1851, and *Harriet Richards*, his widow, was his personal representative.

The facts as to the settlement of the 20th of January, 1846, were these:—*Harriet Richards*, the widow, was entitled for life under the will of her father to the income of one-third of his residuary estate for her separate use, without power of anticipation; and, subject to her life interest, the same third was limited in remainder to her children. *John Richards* the younger was her only child; *G. S. Higgs* was the surviving trustee of the will. On the 7th of April, 1842, *Higgs* sold out 3310*l.* 9*s.* 7*d.* Consols, part of the funds subject to the trusts of the father's will, and lent the proceeds, amounting to 3000*l.*, with 500*l.* of his own monies, to *John Richards* the younger, on the security of the joint and several promissory note of the father, mother, and son. On the 9th of September, 1843, *Higgs* sold out 3155*l.* 0*s.* 1*d.* Consols, further part of the trust funds, and lent the proceeds, amounting to 3000*l.*, to *John Richards* the younger, on the security of a like promissory note. These sums were also secured to *Higgs* by the deposit with him of the title deeds of a house at *Reading*, and a leasehold house in *Regent Street* belonging to *John Richards*, the father. A question arose upon the evidence, at what time this deposit was made. *Higgs* had also, in September, 1839, lent a further sum of 300*l.* to *John Richards* the younger, and one *Shute*, on their joint and several bond; and in the month of October, 1839, he lent another sum of 300*l.* to *John Richards* the younger, on the security of his promissory note. On the 24th of January, 1846, two deeds were executed, both of which



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were dated the 20th of January, 1846. By one of these deeds the Defendant *Harriet Richards*, the mother, released and assigned to *Higgs* her life estate under her father's will, and *Higgs* covenanted, in consideration of such assignment and release, to pay her an annuity of 250*l* for her life; and, by the other of such deeds, *John Richards* the younger assigned to *Higgs* his reversionary interest under the same will, in consideration of the release by *Higgs* of the monies, amounting, as it was stated, to 7165*l*, owing to him by *John Richards* the younger, together with the covenant of *Higgs* to pay off an incumbrance with which such reversionary interest was charged in favour of third persons, and also in consideration of the delivery up of the title deeds of the *Reading* and *Regent Street* property.

The settlement impeached by the bill also bore date the 20th of January, 1846; and *John Richards* the elder thereby, in consideration of natural love and affection, conveyed and assigned his freehold and leasehold property at *Reading* and in *Regent Street*, and some property owing to him on mortgage, to *Hooper* and *Rogers*, upon trust for *Harriet Richards* for her life, with remainder to *John Richards* the elder for his life, with remainder to *Fanny Richards*, the wife of *John Richards* the younger, for her life, for her separate use; and from and after the decease of the several parties so entitled for their respective lives, upon trust, to divide the property equally amongst the children of *Fanny Richards* by her said husband. This settlement was not executed until the 27th of January, 1846, but the draft of it was settled on the 23rd of January.

The Defendants to the suit were *Harriet Richards*, the widow, *Hooper* and *Rogers*, the trustees of the settlement, *John Richards* the younger, and *Fanny* his wife, and

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their children. Evidence was entered into on both sides at great length. On the part of the Defendants it was, amongst other things, directed to prove, that three deeds, dated the 20th of January, 1846, were made to carry out the agreements of the several parties thereto at the time of the transaction, and which agreements were in many respects connected with and dependent upon each other, although not so expressed by the deeds themselves.

Another point arose on the effect of a correspondence between the solicitors of the Plaintiffs and of Mr. and Mrs. *Richards*, on the occasion of the sale and conveyance of the *Notting-hill* ground rents, as amounting to an agreement affecting the liability of the estate of *John Richards* the elder, and the right of the Plaintiffs to institute a suit against *Harriet Richards*, his widow and personal representative, in respect of that estate. These letters are stated in the judgment (a).

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*Argument.*  
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Mr. *Rolt*, Mr. *Baily*, and Mr. *Grove*, for the Plaintiffs.

Mr. *Bethell*, Mr. *Follett*, Mr. *W. M. James*, and Mr. *Kinglake*, for the several Defendants.

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VICE-CHANCELLOR:—

The principal question to be determined is, whether the settlement of the 20th of January, 1846, was founded on good consideration; and, in order to determine this question, it is necessary, in the first place, to consider whether the settlement is to be taken by itself, or in connection with the purchases from *John Richards*, the son, and the Defendant *Harriet Richards*, which were carried into effect by the deeds of even date—whether the settlement and

(a) *Infra*, p. 90.

purchases are to be considered as parts of the same transaction, or as separate and distinct transactions; for if the settlement is to be taken by itself, and as a transaction wholly separate and distinct from the purchase, it does not appear to me that there is any consideration by which it can be supported.

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The question, whether several deeds are to be taken as parts of the same transaction, must, as I apprehend, depend upon all the surrounding circumstances of each particular case, and not upon the simple fact, whether the deeds are or are not by express reference grafted into or connected with each other; and we must therefore, in this case, look to what are the surrounding circumstances, so far as they affect the connection of the deeds. They appear to be these: Trust Stock, to which the Defendant *Harriet Richards* was entitled for life for her separate use, without power of anticipation, with remainder in effect to *John Richards*, her son, was sold out by *Higgs*, the trustee, and the proceeds were lent by him with some monies of his own to *John Richards*, the son, on the security of the joint and several promissory notes of *John Richards*, the father, and *John Richards*, the son, and the Defendant *Harriet Richards*, the wife. These loans, to the extent of 6500*l.*, were further secured to *Higgs* by the deposit of the title-deeds of a house at *Reading*, and a house in *Regent Street*, belonging to *Richards*, the father. *Higgs*, the trustee, purchased the interests of *Richards*, the son, and the Defendant *Harriet Richards*, in the trust stock, and those interests were, or were purported to be, assigned to him by two deeds, which were dated the 20th of January, 1846, and were executed on the 24th of that month. Upon the execution of these deeds the promissory notes were given up, and the deeds which had been deposited were returned to the father. Pending the transaction of these purchases, and on the 12th of January,

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1846, the house at *Reading*, the legal interest in which was vested in *Richards*, the son, in trust for the father, was conveyed by the son to the father. The draft of the settlement in question was prepared and settled before these purchase deeds were executed; the settlement was not executed until the 27th of January; but it appears, that, in the course of the treaty for the purchase of the life interest of *Harriet Richards*, a discussion arose as to the amount of the annuity which *Higgs* was to give for the purchase, and that the amount which he had, in the first instance, proposed to give, being reduced, it was agreed that the property to be put into the settlement should be increased. Under these circumstances, I feel bound to conclude, that the settlement and purchases were connected together, and were in fact parts of the same transaction. There are several circumstances which lead to this conclusion. The delivery up of the deposited deeds, and the conveyance from the son to the father, tending to shew that the property was about to be dealt with, and the corresponding variations in the money to be paid for the life interest, and in the property to be settled, directly evidence the connection of the transactions; and, independently of these circumstances, the evidence in the cause is direct, that the settlement and purchases were parts of the same transaction; which, however, can only be understood to mean that they were so as between the father and son, and the Defendant *Harriet Richards*, for it does not appear that *Higgs*, the trustee, was in any way party to the settlement.

It was indeed contended, on the part of the Plaintiffs, with reference to this and other parts of the case, that there was no sufficient evidence on the part of the Defendants of the bonâ fide deposit of the deeds with *Higgs*, for securing the loans to *Richards*, the son, of 3500*l.* and 3000*l.*; and that the deeds had been passed over to *Higgs*

for the purpose of giving a colour to the settlement: but I do not find that any such case is made by this bill; and I am of opinion that there is sufficient evidence to prove a bona fide deposit of the deeds with *Higgs*.

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The question as to the settlement being upon good consideration does not, however, entirely rest here. It is argued for the Plaintiffs, that, even assuming the settlement and purchases to have been connected together, there is no sufficient consideration for the settlement; that, the wife's life estate being fettered by the restriction against alienation, she could not part with or affect her interest; that it appears by the deed of purchase from her, that all arrears of her income had been paid; and that the assignment by her could furnish no consideration for the settlement: but I cannot agree in this argument. It is true, that the assignment by the Defendant *Harriet Richards* could not pass or affect her future interest; but she was competent to release, and did by the deed of purchase from her release, her trustee *Higgs* from all claims in respect of her past income. Again, the question of consideration, as I apprehend, depends not upon the point whether her assignment passed her interest, but upon this, whether her concurrence enabled the settlement to be made; and it cannot, I think, be doubted, that, but for her concurrence, the assumed purchase of her life interest by *Higgs* never would have been completed. It cannot, I think, be supposed that *Higgs* would have ventured to purchase her life interest merely upon the covenant of *Richards*, the father, and *Richards*, the son, that she would be bound by the transaction, without her concurrence in the deed of assignment to him; or even that he would have purchased the son's reversion without purchasing her life interest also; and if these purchases had not been made, the title deeds deposited with *Higgs* could

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not have been got out of his hands, and the settlement therefore could not have been made. In addition to these considerations, *Richards*, the father, concurred in the breach of trust committed by *Higgs* in selling out the trust stock, and was debtor to *Higgs* on that account; and his deeds, whilst in the hands of *Higgs*, were subject to a lien, to the benefit of which the Defendant *Harriet Richards* was, as I apprehend, entitled; but, when the deeds passed from *Higgs*, the lien was gone; and it was in consequence of the purchase from the Defendant *Harriet Richards*, that the deeds were taken out of *Higgs*' hands, and the lien destroyed.

If, then, the deeds are to be, as I have already determined that they must be, taken together, is it not the fair result of the whole transaction, that the wife must be considered to have agreed with the husband, that, if he would make the settlement, she would not interpose to prevent the title deeds being delivered up? It may be said, that there is no evidence of any such agreement; but, when the transactions are put together, the parties must, I think, be considered to have stipulated according to the rights which they had. Looking at the case in these several points of view, my opinion upon the whole is, that this settlement must be taken to have been for good consideration.

Parties to a series of deeds considered as stipulating according to the rights which they had.

Consideration for a settlement being found to exist, it was held to extend to the whole and not to a part only of the property which was the subject of it.

It was argued for the Plaintiffs, that, although there might be consideration for the settlement of the *Reading* and *Regent Street* property, there could be no consideration for the settlement of the mortgages comprised in the deed; but the settlement was one transaction: and if I am right in concluding that there was consideration for it all, I think the consideration must ride over the whole, and cannot be split, so as to exclude the mortgages from its operation.

It remains, then, to be considered whether the settlement, which was thus made for valuable consideration, was also made *bonâ fide*; for a deed, though made for valuable consideration, may be affected by *mala fides*. But those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration, have, I think, a task of great difficulty to discharge.

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A deed, though made for valuable consideration, may be affected by *mala fides*.

[His Honour then examined the evidence on which the argument on behalf of the Plaintiffs on this point was founded, and concluded that there was not sufficient to impeach the settlement on that ground.]

Upon the whole, therefore, my opinion is, that this settlement is good; and that the bill, so far as it seeks to impeach it, must be dismissed; but it must be dismissed without costs.

There are other grounds on which, perhaps, this settlement might be supported; but I have not thought it necessary to enter into them.

The only remaining question in the cause is as to the right of the Plaintiffs to the general decree for an account. It appears, that, when the *Notting-hill* ground rents were sold, the purchasers refused to complete without the concurrence of the Defendant *Harriet Richards*, being advised that her dower had not been barred; that the Plaintiffs' solicitors then applied to *Richards*, the father, to procure his concurrence; and that, in consequence of this application, they received from the Defendant *Rogers*, who was then acting for *Richards*, the father, and the Defendant *Harriet Richards*, the following letter:—

"Reading, April 1st, 1846.

"I have seen Mr. and Mrs. *Richards* on the subject of

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your letter, and they both feel most desirous not in any way to impede Mr. *Harman's* realising the produce of the ground rents, and Mrs. *Richards* will therefore concur in the conveyances, so as to release her dower. She however feels, in which Mr. *Richards* and myself concur, that, concurrently with her doing this, Mr. *Harman* ought to acquiesce in the request I made some time since, and release Mr. *Richards* from the covenant contained in the mortgage deed. Mr. *Harman* surely will feel, that when he has received from Mr. *Richards* his last property, making on his part a sacrifice of 5000*l.*, in a matter wherein he had no interest, that it is not much to ask, that what to Mr. *Harman* is worthless, but to Mr. and Mrs. *Richards* a rod of perpetual terror, may no longer be hung over their heads. I hope Mr. *Harman* will consider this subject, and that I shall hear from you in a day or two that my request will be acceded to."

This letter was answered by the Plaintiff's solicitors on the 3rd of April, as follows:—

"We have seen Messrs. *Harman* on the subject of yours of the 1st, with reference to releasing Mr. *Richards* senior from his covenant for payment of the 10,000*l.*, and, under all the circumstances, we are authorised to assure you, that although they decline releasing him from the covenant, no proceedings shall be taken against him during his life under such covenant, nor against his estate during the life of Mrs. *Richards*, his present wife, should she survive him. This assurance will, we trust, be satisfactory to them both; and it is given in full confidence, that nothing will be done by Mr. *Richards* to deprive Messrs. *Harman* of any remedy against his property after the deceases of Mrs. *Richards* and himself. Messrs. *Harman* wish also to state, that they depend upon you, with whom the management of both the Mr. *Richards's* affairs appears to rest, that such arrange-



ments may be made with reference to Mr. *Richards'* jun. assets, that Messrs. *Harman* may have a fair proportion of them in common with his other creditors, for such amount, if any, as their mortgage securities shall prove insufficient to meet, and they would like some little information on this subject."

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The defendant *Harriet Richards* soon afterwards concurred in the conveyances of the ground rents to the purchasers; and the question on this part of the case is, whether, under these circumstances, the Plaintiffs are debarred of their right to sue during the life of the Defendant *Harriet Richards*. I am of opinion that they are not. I think that the true meaning of the letter of the 3rd of April was merely this, that any beneficial interest which the Defendant *Harriet Richards* might take in the property of her husband, should not be disturbed during her life. She was not then the representative of her husband, or entitled to any of his property, and she never might become so; and it could never be intended that the Plaintiffs should be precluded from suing a stranger, when she might not be interested in the result of the suit. But valuable consideration was given for the agreement contained in the letter; and I think, therefore, that the Plaintiffs cannot recede from it.

It was argued on their part, that the agreement was conditional, and that it was determined by the conduct of *Richards*, the father; but I think it is no further conditional than that the Plaintiffs relied upon the honesty of *Richards* the father; and that, assuming it to be conditional, the condition did not reach to such a transaction as the settlement in question. There is nothing, I think, which would warrant me in disregarding the agreement. It is not even prayed by the bill that it may be set aside. My opinion, therefore, is, that there must be a decree for

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the accounts, with a declaration that the interest of Mrs. *Richards* is not to be disturbed during her life.

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July 13th,  
 21st, 22nd, &  
 30th.

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A debtor conveyed his life interest in certain property in trust for creditors, parties to the deed; and the creditors, in consideration thereof, granted to the debtor license to reside and attend to his affairs in any place he might think proper, without suit or molestation, in his person or his goods, chattels, and effects, by any such creditors; and that, in case of any suit or molestation by any of such creditors, contrary to the true intent and meaning of such license, the debtor should be wholly released and acquitted of the debt, and the deed might be pleaded in bar:—*Held*, that this amounted only to a license by the creditor to the debtor to live unmolested, and did not operate as a release of the debt or a discharge of the debtor's estate; and that neither a suit by creditors against the trustees and the debtor to enforce the trusts of the deed,—nor an administration suit by the creditor against the estate of the debtor after his decease, for payment of so much of the debt as the trust property was insufficient to pay, was barred by the trust deed or amounted to an acquittance of the debt.

**A CREDITOR'S suit.** The executrix of the debtor set up several grounds of defence to the Plaintiff's claim, and the Master disallowed the claim. The Plaintiff excepted to the report; and the Court being of opinion that some of the grounds of defence suggested, and which had been raised by the answer, were concluded by the decree at the hearing, the cause was allowed to stand over for a petition of rehearing to be presented; and the cause was then argued upon the petition of rehearing and the exceptions.

Several of the points depended on very special circumstances; but one of the grounds of defence to the debt turned on a question not dissimilar to one which was the subject of determination in the preceding case (*a*),—namely, the effect of an agreement not to sue a debtor or his estate; and another question argued was, on the effect of a trust deed for the payment of creditors out of certain property, in preventing the operation of the Statute of Limitations, and keeping alive the debt as against the general estate of the testator.

*Held*, also, that the existence of the trust deed, and the covenants and license therein contained, prevented the operation of the Statute of Limitations during the life of the debtor in respect of the debts, for the payment of which the trust was created.

(*a*) *Harman v. Richards*, supra, p. 91.

The debt, in respect of which the Plaintiff sued, was contracted by Sir *John Osborne* with *W. Neal*, on or before 1822. By deed dated in April, 1822, Sir *John Osborne* conveyed certain estates in *Bedfordshire*, in which he had a life interest, to Lord *Kenyon* and *T. Metcalfe*, upon trust, for the purpose of enabling the trustees to make an arrangement with the creditors of Sir *John Osborne*, and apply the rents and profits of the estates, during the life of Sir *John Osborne*, subject to the pre-existing charges thereon, for the benefit of the creditors entering into the arrangement. Meetings of the creditors were held and an arrangement was made, and carried into effect by a deed, dated the 1st of July, 1823, by which the creditors divided themselves into two classes,—the names of each class forming a distinct schedule to that deed. The creditors of one class, forming the first schedule, consisted of those creditors who preferred to receive annually a rateable proportion of the rents and profits of the estate; and those of the other class, forming the second schedule, consisted of such as preferred to apply their proportionate share of the rents and profits of the estate in the payment of the premiums on policies of insurance which were effected on the life of Sir *John Osborne*. The deed of the 1st of July, 1823 (a), provided, that, in consideration of the provision thereby made for the payment of the said debts of Sir *John Osborne*, with interest as therein mentioned, and the covenants and agreements on his part contained in the deed of April, 1822, the said several creditors parties thereto, and every of them, did thereby give and grant to Sir *John Osborne*, that, in case he should duly observe and perform the several covenants and agreements on his part contained in the indenture of April, 1822, and in all respects duly conform to the true intent and meaning thereof and of the indenture of the 1st of July, 1823, it

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(a) This instrument is stated, than has been thought necessary  
6 Exch. 384 et seq., more fully in this report.

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should be lawful for him (*Sir John Osborne*) to live and reside, and to attend, follow, and negotiate his affairs and business, in any place and in any manner in which he should think proper, without any let, suit, trouble, arrest, attachment, and other molestation or impediment whatsoever, to be done or offered or attempted or procured to be done to him (*Sir John Osborne*), in his person or his goods, chattels, and effects, by the several persons parties thereto, or any of them, or their partners, executors, administrators, or assigns. And also, that, in case any of the said several persons parties thereto, or his partner, executors, administrators, or assigns should sue, arrest, attach, molest, trouble, or impede *Sir John Osborne*, contrary to the true intent and meaning of the license hereinbefore contained, then his, her, or their debt or debts should be considered as discharged, and *Sir John Osborne* should be wholly released and acquitted from the same for ever, and the said indenture should be pleaded in bar of any action or actions, suit or suits, to be brought for the recovery thereof, and such person or persons should be excluded from all benefit and advantage under the said indenture.

*W. Neal*, the Plaintiff's testator, executed the deed for a sum of 1350*l.*, as a creditor in the second schedule. In addition to the ultimate benefit of the policies, the creditors in the second schedule were entitled, under the deed, to require that any surplus of their proportion of the rents and profits, after paying the premiums on the policies of life assurances, should be distributed rateably amongst them. In 1847, during the lifetime of *Sir John Osborne*, the Plaintiff filed her bill against the trustees and *Sir John Osborne*, for the execution of the trusts of the deed, and the distribution of any surplus in the hands of the Defendants, complaining also of some dealings with the estate, as not being in conformity with the trusts. During the progress of that suit, *Sir John Osborne* died, and a sup-

plemental bill was filed against his executrix, and against the trustees, for the distribution amongst the creditors of the amount payable on the policies. In that suit, a question of usury was raised by the Defendants, upon which a case was sent to the Court of Exchequer (a). The Court of Exchequer certified, that the deed was not usurious; and the certificate was confirmed by this Court, and a decree for distribution of the trust funds amongst the scheduled creditors was made. The payment to the Plaintiff, as the representative of *W. Neal*, out of the trust funds provided under the deed, being insufficient to satisfy the amount of the debt for which he was admitted a creditor in the schedule, the plaintiff filed this bill against the executrix of *Sir John Osborne*, for the administration of his personal estate, and payment of the residue of the debt.

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Mr. *Lewin*, for the Defendant, contended, that the deed of July, 1823, amounted to a release of the debt, except in so far as it might be satisfied out of the property, the subject of the trust. The right to sue, once suspended, was gone for ever: *Ford v. Beech* (b). Secondly, if the deed was not directly a release, yet the suit against *Sir John Osborne* in his lifetime brought the case within the covenant against such a molestation, and was a forfeiture of the debt. Thirdly, if the suit against *Sir John Osborne* and the trustees was not a breach of the covenant, the present suit against the executrix certainly came within the provision, and discharged the debt. It was strictly within the words, a suit against "the goods, chattels, and effects" of *Sir John Osborne*. Fourthly, if this were not so, the claim of the Plaintiff must still fail, for the debt was barred by the Statute of Limitations. It was not kept alive by the trust deed, for the property comprised in the trust deed, and

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(a) See 6 Exch. 382.

(b) 11 Q. B. 852.

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thereby dedicated to the discharge of the debt, was wholly distinct from and independent of the general estate of the testator. A promise to pay out of one property was not a promise to pay out of the other: *Hart v. Prendergast* (a), *Tanner v. Smart* (b), *Pott v. Clegg* (c), *Hemp v. Garland* (d).

Mr. *Hare* and Mr. *Hannen* for the Plaintiff, argued that the provision in the deed of July, 1823, was a mere license to Sir *John Osborne* to conduct his business without molestation, but was not a release of the debt, or a contract not to sue the estate of Sir *John Osborne* after his decease. The principle, that a right to sue was lost when once suspended, did not apply to cases in which the true construction of the contract was, to keep alive the debt: *Gibbons v. Vouillon* (e), *Beech v. Ford* (f); that the provision against suing Sir *John Osborne*, "in his person, or in his goods, chattels, and effects," did not protect his estate after his decease; and that the Statute of Limitations had no operation in the circumstances of this case: *Wittersheim v. The Countess Dowager of Carlisle* (g), *Irving v. Veitch* (h).

*Judgment.*

The VICE-CHANCELLOR, after determining another point in the case, as to the sufficiency of the evidence of the Plaintiff's debt, proceeded:—

It was then argued, that the deed of the 1st July, 1823, operated as a release of the debt of Mr. *Neal*; and this argument was founded on that part of the deed, whereby the creditors gave and granted to Sir *John Osborne*, that, in case he should perform the covenants thereby entered into on his part, he might live and reside, and attend to his affairs, in any place he might think proper, without

(a) 14 M. & W. 741.  
 (b) 6 B. & C. 603.  
 (c) 16 M. & W. 321.  
 (d) 4 Q. B. 519.

(e) 8 C. B. 483.  
 (f) 7 Hare, 208.  
 (g) 1 H. Bl. 631.  
 (h) 3 M. & W. 90.

suit, or molestation in his person, or in his goods, chattels, and effects, by any of the creditors who are parties thereto; and, in the absence of any act on the part of Sir *John Osborne* to prevent the Plaintiff from obtaining the full benefit of the deed, it was contended, that this provision operated in effect as a discharge of the debt. I must, however, put such a construction upon the instrument as will not defeat the intention of the parties; and it was clearly not intended that this deed should operate as a release. It is nothing more than a license by the creditors to their debtor, to enable him to live unmolested, in consideration of the trusts of the deed being carried out. The main intent was, that the debts in the schedule should be in some way or other, at some future day, paid or satisfied. It would be utterly inconsistent with that intention, to give to the deed the operation of a present release.

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The third point which was made was as to the question of forfeiture. It was said, that the debt of the Plaintiff, as executrix of Mr. *Neal*, was forfeited by the bill which she filed in this Court, for the purpose of carrying into execution the trusts of the deed, and complaining of breaches of trust by the dropping of one of the policies of life assurance, which formed the fund to which the creditors in the second schedule had to look for the discharge of their debts, and by the transfer of some of the creditors whose names were originally in the second schedule to the first; and it was argued, that this proceeding was such a suing or molesting of the debtor as to bring the Plaintiff within the operation of the proviso in the deed to which I was referred. But this part of the clause does not go so far as that which immediately precedes it, in which the goods, chattels, and effects, as well as the person of the debtor, are protected. In the last part of the clause, Sir *John Osborne* alone is mentioned, and the purport of it evident-

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ly is to protect him personally from molestation. The suit was for the purpose of enforcing the deed itself, and it is impossible to conceive that such an object should work a forfeiture of the rights of the party under the deed. It could not have been intended that the deed should create a right, and at the same time preclude the parties from asserting their title to protection in respect of the right so created.

It was then urged, that the debt was barred by the Statute of Limitations; but I think that this objection is removed by the tenor of the deed, the terms of the license to Sir *John Osborne* precluding any suit against him during his life for payment of the debt otherwise than in the manner provided by the deed. It is according to the terms of the deed that no proceedings for the recovery of the debt, otherwise than out of the appropriated property, shall be taken during the life of Sir *John Osborne*; and the debtor, or his representatives, cannot, under such circumstances, afterwards set up this abstinence of suit, in pursuance of the contract, as a bar to the claim of the creditor.



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## EDDLESTON v. COLLINS.

A BILL for foreclosure of a mortgage of copyhold premises, holden of the manor of *Lyles* in *Cottenham*, in the county of *Cambridge*. *Mary Ann Ward* was admitted to the premises in question in April, 1843, and she afterwards married *Thomas Collins*. *Collins* and his wife, in May, 1844, surrendered the premises to *Adcock*, by way of mortgage, to secure 50*l*. On the 3rd of December, 1846, *Adcock* made a further advance of 100*l*. to *Collins* and his wife; and the bill stated, that, upon this date, *Mary Ann Collins*, the wife, being first privately examined by the deputy steward of the manor, separately and apart from her husband, and freely and voluntarily consenting, surrendered the premises, subject as therein mentioned to such uses, upon such trusts, and to and for such estates, &c., in favour or for the benefit of *Thomas Collins*, his heirs and assigns, and subject to such powers of sale and other powers, and charged with the payment of such sum and sums of money, as *Stephen Adcock*, his heirs, executors, administrators, or assigns, by any deed or deeds in writing, to be by him, them, or any of them legally executed, should, at the request of *Collins*, his heirs, executors, administrators, or assigns, at any time, and from time to time, within twenty years from the date thereof, direct, limit, or appoint, and in default of and until such direction, limitation, or appointment, to the use of *Stephen Adcock*, his heirs and assigns, according to the custom of the manor, subject to the surrender of the 20th of May, 1844, and also subject to a further proviso for redemption by *Collins*, his heirs, executors, &c. *John Bell*, who acted as the deputy steward of the manor, and took the examination of Mrs. *Collins*, was in the twenty-first year of his age, but wanted some months of attaining his full age of twenty-one: he

April 22nd  
& 23rd;  
Aug. 6th.

The separate examination of a married woman held to be well taken for the purpose of aliening her copyhold estate by a deputy steward, who was a minor.

The steward of a manor, although a minor, may execute the office, if he have sufficient discretion.

The duty of taking the examination of a married woman on the conveyance of her estate, is not a judicial duty—*Scoble*.

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had been articulated as a clerk to Mr. *Adcock* (who was an attorney), and had recently completed his five years of service.

The estate was afterwards charged by *Collins* with several other sums advanced to him by *Adcock*. The Plaintiff took a transfer of the mortgage from *Adcock*. *Collins* died; and *Mary Ann*, his widow, intermarried with *William Smith*. *Smith* and his wife were Defendants to the bill.

*John Bell*, the deputy steward, was examined as a witness for the Plaintiff, and said he was appointed by *Clement Francis* to act as his deputy steward, to accept and take the surrender of the 3rd December, 1846, by *Thomas Collins* and *Mary Ann* his wife, and that he took the surrender in duplicate. He said, "the now produced surrender, and the part left with *Clement Francis*, were respectively signed by *T. Collins* and *Mary Ann*, his wife, in my presence, as such deputy steward; and I accepted and took the same as a surrender of the hereditaments therein comprised. Before taking the surrender, I examined *Mary Ann Collins* in another room, separate and apart from *T. Collins*, her husband, as to her knowledge of the contents and effect of the surrender and her consent thereto; and on that occasion I read such surrender to her, and explained the nature and effect thereof. She fully understood the contents and effect of the said surrender, and freely and voluntarily consented to make it."

Argument.

Sir *W. P. Wood* and Mr. *Smythe*, for the Plaintiff, argued that the non-age of the deputy steward, which was relied upon by the Defendants, *Smith* and his wife, as an imperfection in the Plaintiff's title, was not material. They

cited the following cases as examples of the offices which an infant might hold and execute, when such offices were ministerial,—as the office of registrar, *Young v. Stoell* (a); clerk of the peace, *Crosbie v. Hurley* (b)—and the infant was not of such years as to render the execution of them impossible: *Young v. Fowler* (c). It was said in *Viner*, that “An infant might be mayor, abbot, or bishop, without disability; and if he be executor, he may make release of the debt of the testator” (d). The performance of ministerial acts was distinguishable from those which were of a judicial kind, *Scambler v. Waters* (e), although, even in such cases, the power and right of exercising the office by an infant was not always excluded, as in the case of courts martial, the judgments of which would not be vitiated by the circumstance that one of the officers composing the tribunal might be under twenty-one. And there were many cases in which the acts and deeds of infants were supported: *Zouch v. Parsons* (f), *Allen v. Allen* (g), ——— v. *Handcock* (h), *Barrow v. Parrot* (i). The deputy steward, in this case, de facto filled the office and performed the functions, and his acts in the office without malversation would be supported: *Hippisly v. Tucke* (k). It would be of dangerous consequence to allow a conveyance to be impeached on such grounds. If a fine “be received and recorded, the feme covert or her heirs shall not be received to aver, that she was not examined nor assented; for this would be against the record of the Court, and tend to the weakening of the general assurances of the realm:” 2 Inst. 515. “The law is not very curious in examining the imperfections of the steward’s person, nor the unlawfulness of his authority;

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|-----------------------------------|----------------------------------|
| (a) Cro. Car. 279.                | (f) 3 Burr. 1794.                |
| (b) Alcock & N. 431.              | (g) 1 Con. & L. 453, per Sir Ed- |
| (c) Cro. Car. 555; S. C., March,  | ward Sugden.                     |
| 38.                               | (h) 17 Ves. 384.                 |
| (d) 9 Vin. p. 404, tit. “Enfant.” | (i) 1 Mod. 246.                  |
| (I.), pl. 4.                      | (k) 2 Lev. 184.                  |
| (e) Cro. Eliz. 636.               |                                  |

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for, be he infant, or non compos mentis, an idiot or lunatic, an outlaw or an excommunicant, yet, whatsoever things he performeth as incident to his place, can never be avoided for any such disability, because he performeth them as a judge, or, at least, as custom's instrument:" Co. Copyholder, p. 127, § xlv.

Mr. Glasse and Mr. Beales for the Defendants, *W. Smith* and *Mary Ann* his wife, cited and relied on the rule laid down by Lord *Coke*, as unimpeached by any subsequent authority. "An infant or minor is not capable of an office of stewardship of the court of a manor either in possession or reversion" (a). Lord *Coke*, in his "Complete Copyholder," s. 46, speaking of an under-steward, says, that "some have thought that an under-steward may be made without special words in the steward's patent authorizing him to make a deputy; but surely, since it is an office of knowledge, trust, and discretion, it cannot, unless it be in cases of necessity." The argument for the Plaintiff has conceded that the functions of a judicial office cannot be performed by an infant; and that this portion of the duties of the steward is judicial, is distinctly laid down by Lord *Hale* in *Hes' case* (b), in which he said, "the steward is judge of that part of the court which concerns the copyholds, and is register of the other." The separate examination of married women is, in fact, a portion of the judicial duty, as is proved by the practice of this Court, in which the separate examination is habitually taken by the Judge alone. The importance of the duty is shewn by the circumstances of this case, in which, if the surrender be supported, the result will be that the Defendant *Mrs. Smith* will be wholly deprived of her estate.—Gilbert's Tenures, p. 415, and Brooke's Ab., vol. 1, p. 196, were also cited.

(a) Co. Litt. 3. b.

(b) 1 Vent 153.

Sir *W. P. Wood*, in reply, said, that even if the rule of law had been, that a minor could not be a steward, still it would not follow that he might not be a deputy steward, for the performance of such of the functions of the steward as were in their nature ministerial. The steward alone could appoint a deputy; it was not contended that the under-steward could do so. The taking consents of married women was a duty which the Judges of this Court and of the Court of Common Pleas frequently delegated, thus shewing that it was not a duty of a judicial nature.

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VICE-CHANCELLOR:—

The sole question reserved for judgment in this case was, whether a surrender of a copyhold estate, taken on the 3rd of December, 1846, out of Court by a deputy steward, who was under the age of twenty-one years, was void by reason of the non-age of the under-steward. The surrender was by husband and wife, the wife being first privately examined by the deputy steward. The deputy steward had been for five years an articulated clerk to a solicitor, and was upwards of twenty years of age, having been born on the 24th of February, 1826.

Judgment.

I have looked into the cases which were cited in the argument, and into several other cases bearing upon the subject, and I am of opinion the surrender in question is not void. The argument in support of the position that the surrender was void was mainly based upon *Scamler's case* (a), in which it appears to have been ruled by *Popham, J.*, and *Fenner, J.*, that an infant could not be a steward, and upon the adoption of that ruling by Lord *Coke* (b). But the authority of *Scamler's case* was denied in *Young v. Fowler* (c); and in another report of the same case of *Young*

(a) *Scamler v. Waters*, Cro. Eliz. 636.

(b) Co. Litt. 3. b.

(c) Cro. Car. 555.

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v. *Fowler* (a), it is stated (b) that the decision in *Scamler's case* was contrary to what is reported in *Croke Elizabeth*. I think, therefore, that *Scamler's case* cannot be relied on; and in *Coke's Copyholder* (c), it is distinctly stated, that an infant may be a steward, and that what he performeth as incident to his place cannot be avoided for such disability.

It was then argued, that, if an infant can be a steward at all, it could only be when the office was granted with a clause to exercise it "per se vel deputatum suum," in which case he could appoint a deputy; and that the appointment of an infant under-steward would be void, because of course he could not appoint a deputy. And this argument was supported by another passage in *Coke's Copyholder* (section 46), in which it is said, that a steward cannot, without special words in his patent, appoint an under-steward unless in case of necessity; as, if an office of stewardship descend unto an infant, he may make a deputy steward, because the law presumes that he is himself incapable to execute it. But this does not appear to me to be at all inconsistent with its being shewn that the steward, although an infant, is capable of executing the duties of his office; and I think that this is the true meaning of the passage referred to, for it is, I think, to be collected from the case of *Young v. Fowler*, both as reported in *Croke Charles*, and in *March*, that a steward, although an infant, may execute the office, unless he be of such tender years that he has not discretion to exercise it. And this is confirmed by what is said in *Young v. Stoell* (d) with reference to the office of Bishop's Registrar, where it is said, that the grant of the office to an infant was not void because the infant could not make

(a) *March*, 38.

(b) *Id.* 43.

(c) *Sect.* 45.

(d) *Cro. Car.* 279.

a deputy, for that the infant might have sufficient knowledge to write, and register acts, which was sufficient for his place. And there are many other cases which support this distinction as to the competency of the infant, of which perhaps the most remarkable is, that an infant of the age of seventeen years was capable of being an executor, and had nearly all the powers incident to that office.

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*Judgment.*

The importance of the duties incumbent upon a deputy steward in taking the examination of a married woman, was urged on the part of the Defendants as a reason against the validity of the appointment of an infant as deputy steward; and indeed *Ile's case* (a) was referred to, to prove that the office of steward was judicial; but although some of the duties of the office may possibly be judicial, I think it clear that this duty of taking the examination of married women is not so; for, if it was, it could never be delegated at all, and yet it is a duty which the Court itself is in the constant habit of delegating, by issuing commissions for the examination of married women; and the Court as constantly acts upon the return of such commissions, without inquiring whether any of the commissioners were infants or not.

The examination of the married woman in this case, taken by the deputy steward, has been followed by the entry of the surrender upon the rolls of the manor; and although of course the surrender might be impeached, upon proper grounds brought forward, by a cross bill, I am of opinion that it cannot be held to be wholly void upon the ground suggested; and therefore there must be the usual decree for an account of what is due upon it.

(a) 1 Vent. 153.

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Estates settled on the husband for his life, with remainder to his sons successively in tail, remainder to the husband in fee, were devised by the husband, *in case he should die without having any issue* by his wife, to his wife for her life, remainder to his brother for his life, with remainder in trust for sale, with a direction to pay 4000*l.* out of the proceeds, rents, and profits, to the eldest daughter of the brother, to be a vested interest on her attaining twenty-one or day of marriage:—*Held*, that, upon the true construction of the will, the ulterior limitation depended on the failure of issue at the death of the testator, and not on the general failure of issue; and that the daughter was entitled to the 4000*l.*

## IN THE MATTER OF RYE'S SETTLEMENT.

**A** PETITION for payment of a sum of 4000*l.*, part of a larger sum paid into Court under the Trustee Relief Act. By the settlement made upon the marriage of *Joseph Jekyll Rye* and *Dorothy Clavering*, dated in 1797, certain estates were settled by *Joseph Jekyll Rye*, subject to a term of ninety years for securing a rent-charge for pin-money to the wife, to the use of *Joseph Jekyll Rye* the husband, and his assigns, for life; with remainder, subject to a rent-charge to commence after his decease, limited to *Dorothy* his wife for her life by way of jointure, and to a term of 100 years thereby created for securing the same; and subject also to a term of 2000 years, thereby limited to trustees upon trusts for securing portions for younger children of the marriage,—to the use of the first and every other son of *Joseph Jekyll Rye* by *Dorothy* his wife, severally and successively, according to their respective seniority, in tail male; with remainder, for default of such issue, to the use of *Joseph Jekyll*, his heirs and assigns, for ever.

*Joseph Jekyll Rye*, by his will, dated in 1816, after reciting, that, previously to his marriage with *Dorothy* his wife, he had settled and assured such of his estates in the county of *Northampton* as he was then seised of in fee, to and for such uses, intents, and purposes, as in his said marriage settlement were declared, he proceeded, “but in case I shall depart this life without leaving issue by my said wife, then I devise all” the estates comprised in the set-

Where the ulterior limitations in a will are made to depend upon a failure of issue of the testator, and there are found amongst the ulterior limitations provisions which could not reasonably be meant to depend upon a general failure of issue, the will is to be construed as referring to a failure of issue at the death, and not to a general failure of issue.

The fixing of the time of the death of living persons as the period of disposition, considered as inconsistent with the notion that the legacy was to take effect only on general failure of issue.



tlement "unto my wife for her life." "And from and immediately after the decease of the said *Dorothy* my wife, I devise all my said 'settled estates' unto my brother *Peter Rye* for his life; and after the determination of that estate by forfeiture, surrender, or otherwise, in his lifetime, and also from and immediately after his decease, I give and devise all my said "settled estates to trustees in fee. And the testator declared the trusts to be, that the said trustees should, with all convenient speed after the several deceases of his wife and his brother and the survivor of them, sell all the said settled estates, and pay the money arising by such sale, and by the rents and profits of such premises in the meantime as therein mentioned, to *Elinor Rye*, his brother's eldest daughter, 4000*l.*, at her age of twenty-one or day of marriage, which should first happen; but on either of such events, the said legacy or sum of 4000*l.* should then become a vested interest in her, notwithstanding the payment thereof should be postponed till after the decease of the survivor of the wife and brother of the testator, with certain other trusts in case *Elinor Rye* should die without issue before she attained twenty-one or married. And upon further trust to pay and divide all the residue of the monies arising from such sale or sales as aforesaid, and the rents and profits of the premises in the meantime, unto and amongst all the other children of *Peter Rye* (except *Elinor*), equally.

*Joseph Jekyll Rye* died in 1819, without having had any issue by his marriage, leaving *Dorothy* his widow, and *Peter Rye* his brother, surviving. *Dorothy* died in 1825. In December, 1842, *Peter Rye* executed a deed, creating trusts for sale of the settled estates, and distribution of the purchase-money, on the supposition that the trusts declared of the surplus proceeds by the will of *Joseph Jekyll Rye* (after payment of the 4000*l.* to *Elinor*) would fail of effect, and that *Peter Rye* would take as heir-at-law. *Peter Rye*

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died in 1850. There were several children of *Peter Rye*, but all of them predeceased him except the said *Elinor* his eldest daughter. *Elinor* married *Charles Cary Elwes* in 1826, and the 4000*l.* was put into settlement upon the marriage. The estates were sold after the death of *Peter Rye*; and doubts having been raised by the purchasers as to the validity of the devise by the will of *Joseph Jekyll Rye*, the surviving devisee in trust under the will and the trustees under the settlement of December, 1852, joined in the confirmation to the purchasers, and the purchase-money was paid into Court under the Trustee Relief Act. The petition for payment of the 4000*l.* out of these monies was presented by the trustees and the parties interested under the settlement made in 1826 on the marriage of *Elinor*.

Argument.

Mr. *Rolt* and Mr. *Greening* for the petitioners.—The words “in case I shall depart this life without leaving issue by my said wife,” taking them not to be merely referential to the uses of the settlement, will be construed “without leaving at my decease issue,” &c. There is no reasonable distinction between the present case and *French v. Cad-dell* (a). The contingency is determined when the devise takes effect. In the cases of *Vanderplank v. King* (b), and *Williams v. Teale* (c), the Court looked at the events as they stood at the death of the testator. If the clause be merely referential to the limitations of the settlement, those limitations wholly failed on the death of the wife: *Jones v. Morgan* (d), *Morse v. Lord Ormonde* (e), *Egerton v. Jones* (f), *Eno v. Eno* (g). The internal evidence afforded in this case by the dispositions made of the estate and of the mo-

(a) 3 Bro. P. C. 257, Toml. ed.

(b) 3 Hare, 1.

(c) 6 Hare, 239.

(d) 3 Bro. C. C. 323, Toml. ed.

(e) 1 Russ. 382; S. C., 5 Madd. 99.

(f) 3 Sim. 409.

(g) 6 Hare, 171.

nies to arise from the sale, especially of the 4000*l.*, and also by the disposition of the interim rents,—some of which are not reconcilable with the supposition that the testator contemplated an indefinite failure of issue,—is altogether favourable to the restrictive construction: *Wellington v. Wellington* (a), *Lytton v. Lytton* (b), *Sanford v. Irby* (c).

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Mr. Glasse and Mr. Hanson for respondents claiming under *Peter Rye*.—The devise is void for remoteness: *Lady Lanesborough v. Fox* (d), *Bankes v. Holmes* (e). The exceptional construction, which would restrict the issue to those provided for by the settlement, is objectionable, as it would exclude female issue of the testator from inheriting. It cannot be supposed that the testator intended to exclude his own daughters or the daughters of his sons, which must be the case if the clause be taken as referential. The cases cited, 2 Jarm. on Wills, p. 421, in support of the proposition there stated, that “where a testator, having no issue, devises property in default or in failure of issue of himself, it is considered that his evident object is simply to make the devise contingent on the event of his leaving no issue surviving him, and that he does not refer to an extinction of issue at any time,” do not establish that proposition. The case of *Eno v. Eno* is distinguishable, upon the ground that there the limitations were correctly recited, and the intention plainly shewn of disposing of the property subject only to the existing life estates, and the instrument, being an appointment, was construed as if it had been inserted in the settlement creating the power: *Doe d. Todd v. Duesbury* (f), Treatise on the Law of Property as administered in the House of Lords, p. 351.

(a) 4 Burr. 2165.

(b) 4 Bro. C. C. 441.

(c) 3 B. & A. 654.

(d) Ca. temp. Talb. 262.

(e) 1 Russ. 394, n.

(f) 8 M. & W. 530, per Rolfe,

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Mr. G. L. Russell, for other parties, cited *Southby v. Stonehouse* (a).

*Judgment.*

VICE-CHANCELLOR — (after stating the original settlement, the will of *Joseph Jekyll Rye*, the settlement of the 4000*l.* thereby bequeathed to *Elinor* the daughter of *Peter*, the sale of the estates, and the payment of the purchase money into Court):—

The trustees and cestuis que trustent under the settlement of the 4000*l.* made on the marriage of *Elinor*, have presented their petition for payment to them of that sum. It has been opposed by parties claiming under dispositions made by *Peter Rye* in his character of heir, under the title accruing to him by the death of his other children. Amongst those dispositions there was a settlement made by him in the year 1842, by which he settled the proceeds of the sale of the estates, subject to and after payment of the 4000*l.* legacy; and the petitioners have partly founded their claim upon this settlement; but, in the view which I take of this case, it is unnecessary to consider the question as to the petitioners' right under this settlement.

The substantial question is, whether the gift of the 4000*l.* legacy is void for remoteness, as depending upon a general failure of issue of *Joseph Jekyll Rye*. The argument on the part of the petitioners on this point was, that even if the will of *Joseph Jekyll Rye* was to be construed as having rendered the ulterior limitations dependent upon the general failure of his issue, the 'gift of the legacy would nevertheless be good, the issue of *Joseph Jekyll Rye* having failed at the period of his death, when his will

took effect; but that, upon the true construction of his will, the ulterior limitations depended on the failure of his issue at the period of his death, and not upon the general failure of his issue; and I am of opinion that this is the true construction of the will, and that the petitioners are therefore entitled to the legacy.

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The cases which were cited on the part of the petitioners appear to me to establish at least this proposition—that, where the ulterior limitations in a will are made to depend upon a failure of issue of the testator, and there are found amongst the ulterior limitations provisions which could not reasonably be meant to depend upon a general failure of issue, the will is to be construed as referring to a failure of issue at the death, and not to a general failure of issue. The question is one of intention, and the context of the will proves the intention. The creation of life estates after the failure of the issue, would not be sufficient to limit the failure of the issue to the death of the testator; for it would be consistent with an intention, that the tenants for life should take if the issue failed in their lifetime; and I place no reliance therefore in this case upon the life estates given to the wife and to the brother: but here the legacy of 4000*l.* is to vest in the legatee at twenty-one or marriage, and is to be paid immediately after the deaths of the wife and the brother; and, as to this time of payment, it was indifferent whether the wife and brother had life estates or not. The fixing of the time of payment in this manner appears to me to be wholly inconsistent with the notion that the legacy was meant to take effect only upon the general failure of the testator's issue, and, therefore, to decide the question in this case in favour of the petitioners.

It was much pressed in argument that I should give my opinion upon the more general question raised on the part

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*Judgment.*

Construction  
 of a will as sup-  
 posing the tes-  
 tator to contem-  
 plate the period  
 of his death  
 with reference  
 to the objects  
 who are to take  
 under his will,  
 and to look be-  
 yond that pe-  
 riod with refer-  
 ence to the  
 event on which  
 his dispositions  
 are to take  
 effect.

of the petitioners, as to what would have been the effect of the testator's issue having failed before the period of his death, assuming the limitations of his will to be dependent upon the general failure of his issue; but the point is one of such general importance that I should not be satisfied to give any opinion upon it without having it more fully and deliberately argued. The argument upon it has not, I think, been exhausted. Something might be said upon the nature of a testamentary instrument, of which the making is the inception and the death the consummation; and, with respect to the cases before Vice-Chancellor *Wigram*, it might perhaps be argued, that a testator might look to the period of his death with reference to the objects who are to take under his will, and might look beyond that period with reference to the event in which his dispositions were to take effect. There are, besides, authorities upon the subject which have not been examined or commented upon, and which appear to be in direct conflict, I refer to *Mackinnon v. Peach* (a) and *Harris v. Davis* (b). I must decline, therefore, on this occasion, unnecessarily to decide the point.

(a) 2 Keen, 555.

(b) 1 Coll. 416, 424.

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LEWIS v. THE SOUTH WALES RAILWAY  
COMPANY.Nov. 13th &  
17th.

A SPECIAL case. The question was as to the liability of the Company to the payment of interest on a sum of 9467*l*. 7*s*. 10*d*.

The Company was projected in 1845, and the line of the railway was intended to pass through the estate of Mr. *Lewis*. Mr. *Lewis* was seised of part of the estate in fee, and other part of it was in settlement,—he being tenant for life with remainder, subject to some intervening limitations which failed of effect, to the Plaintiff for his life. Mr. *Lewis* opposed the passing of the bill; and thereupon an agreement, dated the 1st of July, 1845, was entered into between him and three of the promoters of the Company; whereby the promoters covenanted and agreed with him, that if the bill should pass into a law during the then session, and the projected Company should require to take, enter upon, or use any of the lands of Mr. *Lewis*, therein referred to, for the purposes of the railway, then and in such case, before any part of his said lands should be taken, used, or entered upon by or on behalf of the Company, except for the purposes of surveying and setting out the line thereof, the Company or the said parties thereto of the first part should pay, or cause to be paid, compensation for and in respect of the purchase of any of the said lands, and for damage by severance or otherwise to the landlords or tenants, and also for the deterioration and injury which would be done to the family estate; the amount of such purchase-monies, damages, and compensation to be estimated and determined by arbitrators as therein mentioned, and, in case of dispute, by the umpire therein

A Railway Company contracted with the owner of lands to pay interest for the purchase-money, and compensation to be awarded, for so much of the lands as should be taken for the Railway; and it was agreed that the money should be deposited in a certain bank until the completion of the purchase, and that the interest should be paid to the owner up to and inclusive of the day on which the purchase should be completed:—*Held*, that the reasonable construction of this agreement was, that it referred to the completion of the purchase by the purchaser; that, on the part of the purchaser, the purchase was completed by the payment of the purchase-money into Court; and that it did not necessarily refer to the complete conveyance of the estate, and the purchase.

the final settlement of

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 ———  
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*Statement.*

named. And it was provided, that the provisions of the Lands Clauses Consolidation Act, 1845, should apply to the arbitration thereinbefore agreed to, except as to any stipulation or provision in this agreement specially mentioned; and that, in making their valuation or award, the said surveyors and umpire should separately and distinctly value, ascertain, and distinguish the amount of purchase-money or compensation to be paid for the lands of which Mr. *Lewis* was tenant for life, and those to which he was entitled in fee. And that the said Company should pay the amount so ascertained and determined for the lands to which Mr. *Lewis* was entitled in fee simple to him, his heirs, or assigns, and pay or apply the remainder according to the provisions of the Lands Clauses Consolidation Act, 1845, with respect to purchase-money or compensation coming to parties having limited interests.

Upon the execution of this agreement, Mr. *Lewis* withdrew his opposition to the bill, and it was passed. Soon after the passing of the bill, the Company required to take some parts of the estate for the purposes of their railway; and the value of the parts to be taken was fixed by an award, according to the provisions of the agreement. The parts required to be taken comprehended portions both of the fee simple lands and of the settled estates, and the award fixed the value of the portions of the settled estates at 9467*l.* 7*s.* 10*d.*, and of the portions of the fee simple estates at 1295*l.* 14*s.* This award was dated the 9th of March, 1847; and soon after it was made, the Company required possession of the lands; and a further agreement was then entered into between the Company and Mr. *Lewis*; whereby, after reciting the agreement of July, 1845, and the award, and that the Company had applied for immediate possession, to which Mr. *Lewis* had agreed, upon the sums of 9467*l.* 7*s.* 10*d.* and 1295*l.* 14*s.* being deposited with Messrs. *Glyn & Co.* in the joint names of Messrs.



*W. O. & W. Hunt* and Messrs. *Metcalfe & Woodhouse*, at the risk of the Company, and upon the Company entering into the agreement thereafter contained; and reciting that the said sums had been deposited accordingly:—it was agreed, that the said sums of 9467*l.* 7*s.* 10*d.* and 1295*l.* 14*s.* should be and remain in the possession of Messrs. *Glyn*, at the risk of the Company, until the completion of the purchase, when the same should be paid over to the parties respectively entitled to the same, or be paid into the Court of Chancery, as the case might be; and that the Company should pay Mr. *Lewis* during his life, and to the parties respectively entitled to receive the same after his decease, interest on the said sums at 5*l.* per cent. per annum by two half-yearly payments, the first whereof should commence and be computed from the day on which the abstract of the title of Mr. *Lewis* to the lands should be delivered to Messrs. *Hunt* on behalf of the Company, up to and inclusive of the day on which the said purchases should be completed. And it was agreed, that, so far as it was not thereby altered, the agreement of the 1st day of July, 1845, should continue. The said sums having been paid into the bank of Messrs. *Glyn & Co.* in the joint names of the solicitors of the Company and the solicitors of Mr. *Lewis*, the Company were then let into possession. The abstracts of the title to the settled estates were delivered on the 15th of April, 1847, and to the unsettled estates on the 19th of April, 1847. On the 21st of April, 1847, Mr. *Lewis* died, and the Plaintiff became tenant for life of the settled estates, and the solicitors of Mr. *Lewis*, the deceased, became the solicitors of the Plaintiff. There was much discussion on the title to the settled estates, but ultimately the Company accepted the title, and forwarded the draft conveyance to the Plaintiff's solicitors, who approved of the draft. The Company's solicitors then engrossed the conveyance, and, on the 22nd of May, 1849,

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 —  
*Statement.*

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forwarded the engrossment to the Plaintiff's solicitors, with the following letter:—

"We send you the engrossment of the conveyance of the settled estates for execution. The directions for payment into the Bank of the sum awarded for the settled estates will be ready to-morrow; and we shall be obliged by your informing us when it will suit your convenience to attend in the city for the purpose of seeing the money paid in."

The Plaintiff's solicitors then expressed their readiness to attend at the Bank of *England* on the 26th of May, 1849, to see the 9467*l.* 7*s.* 10*d.* paid into the Bank; and accordingly on that day the sum was drawn out of the bank of *Glyn & Co.*, and paid into the Bank of *England* to the account of the Company's Act; and the usual receipt was given for it by one of the cashiers of the Bank. On the 28th of May, 1847, the Company's solicitors sent to the Plaintiff's solicitors a copy of the receipt, with a letter, stating that they had filed it, which they had in fact done; and on the 5th of June, 1849, the conveyance was executed by the Plaintiff; but it remained in the hands of the Plaintiff's solicitors, and was never delivered over to the Company. On the 21st of August, 1849, they wrote to the Company's solicitors, as follows:—

"We inclose a statement of the amount payable by your clients, with the particulars of the usual charges; and we shall be glad to receive from you an appointment for the completion of the business."

In this letter they inclosed an account, in which they charged the interest on the 9467*l.* 7*s.* 10*d.* from the 15th of April, 1847, the date of the delivery of the abstract, to the 26th of May, 1849, the time of the payment into the Bank, only, and also charged the costs. This account was mislaid; and the Company having required a statement of

the interest which was claimed, the Plaintiff's solicitors, on the 7th of February, 1851, sent them a new account, in which they charged the interest on the 9467*l*. 7*s*. 10*d*. down to that date. There were difficulties in the title to the unsettled lands, and the purchase was completed as to part of those lands only. The purchase-money for those parts was paid out of the monies deposited with Messrs. *Glyn & Co.*, and the balance remained in their hands. No part of the 9467*l*. 7*s*. 10*d*. paid into Court was invested, and no petition was presented for that purpose.

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 SOUTH WALES  
 RAILWAY Co.  
 —  
*Statement.*

The question on the case was, whether, having regard to the true construction of the agreements of the 1st of July, 1845, and the 6th of April, 1847, and the general Acts of Parliament relating to railways, so far as the same, under the circumstances, affected the question, the interest on 9467*l*. 7*s*. 10*d*. ceased to run from and after the 26th of May, 1849, the day of payment of the said sum into the Bank of *England*; or whether, notwithstanding such payment, the interest on the said principal sum continued to run, and would so continue to run, for any further and what period of time.

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Sir. *W. P. Wood* and Mr. *Lewin* for the Plaintiff.—Payment of money into Court is no doubt an ingredient towards the completion of the purchase; but it cannot, in any accurate sense of the words, be deemed a completion of the purchase. It is not a circumstance from which the owner of the estate has derived any benefit. It has not compensated him for the taking of his land; and the land having been taken, his stipulation, that he should receive interest until completion, takes effect: *Ex parte The Earl of Hardwicke* (a), *De Visme v. De Visme* (b).

*Argument.*  
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(a) 1 De G., Mac., & G. 297.

(b) 1 Mac. & G. 336.

1852.  
 {  
 LEWIS  
 v.  
 SOUTH WALES  
 RAILWAY CO.  
 —  
*Argument.*

*Mr. Rolt and Mr. G. L. Russell*, for the Company, argued, that the payment of the money into Court was, in fact, the completion of the purchase, within the meaning of the contract. It was all that the Company could do. This was, moreover, the construction which the parties had themselves put upon the contract; and if there were any difficulty in putting that construction on it, the Court would find evidence, in the acts and correspondence, that the contract in that respect had been altered by the parties.

*Judgment.* VICE-CHANCELLOR:—

I am of opinion, that, under the circumstances of this case, the interest upon the 9467*l.* 7*s.* 10*d.* ceased to run from the 26th of May, 1849. The question, as it seems to me, depends upon the construction of the agreement of the 6th of April, 1847, taken in connection with the subsequent conduct of the parties. The original agreement of the 1st of July, 1845, does not, I think, assist us in determining the case; for the two agreements relate to distinct matters: the first, to the purchasers not having possession until the purchase-money is actually paid; the second, to their having immediate possession, without the actual payment of the purchase-money. We must first look, therefore, to the terms of the agreement of the 6th of April, 1847.

The recitals of the agreement do not appear to me to throw any light upon the case. They are merely, that the Company have requested *Mr. Lewis* to give them immediate possession, which he has agreed to do, upon their depositing the purchase-money, and entering into the agreement hereinafter contained. We are referred, therefore, to the operative part of the agreement, to ascertain the

terms; and the important words to be considered are "until the completion of the purchase" in that part of the agreement which relates to the deposit at *Glyn's*, and "up to and inclusive of the day on which the purchase shall be completed" in the clause relating to the payment of interest.

1852.  


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 LEWIS  
 v.  
 SOUTH WALES  
 RAILWAY CO.  


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*Judgment.*

The question is, what is the meaning of the words "until the completion of the purchase." Those words may, no doubt, import, and generally perhaps would be construed to refer to, the complete conveyance of the estate and final settlement of the business; but I do not think this is the only or necessary meaning of the words. They may mean, until the completion of the purchase by the purchaser, as to whose part the purchase is completed by the payment of the purchase-money; and the question is, whether this is not the true meaning of the words as contained in this agreement. Now, the words of every agreement must, as I apprehend, receive a reasonable construction with reference to the subject-matter of the contract; and here the subject-matter of the contract is the possession and the payment of interest on the purchase-money. What then is the reasonable construction of the words with reference to this subject-matter. Is it reasonable to construe them as importing that interest was to be paid upon the purchase-money until the final completion of the purchase, though the purchase-money itself might be paid before. I think it would be unreasonable to put such a construction upon them; and the more so, when it is considered that interest is the compensation for delayed payment of principal. That an agreement might be so expressed as to make interest on the purchase-money payable up to the final completion of the purchase, although the purchase-money itself was sooner paid, need not be denied; but I think very strong words would be required for the purpose, and that the terms of this agreement do not warrant such a con-

1852.  
 }  
 LEWIS  
 v.  
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 Judgment.

struction. The close connection which is found in this agreement between the completion of the purchase and the payment of the purchase-money leads, I think, to the opposite conclusion. My opinion, therefore, upon the construction of this agreement is, that the words "of the completion of the purchase," as used in the agreement, must be construed to mean the completion on the part of the purchaser by payment of purchase-money. The other construction would, as was well observed on the part of the Defendants, lead to the conclusion, that interest was payable upon the whole purchase-money, although nearly the whole of it might long have been paid.

The conduct of the parties in this case confirms this construction of the agreement; for, when the account is delivered in August, 1849, the interest is computed only to the 26th of May, 1849, when the purchase-money was paid into Court.

Supposing that the construction which I have put upon the agreement be not the true construction, there might perhaps be difficulty, under the circumstances which are here stated, in taking the case out of the range of *De Visme v. De Visme* (α); but I decide this case upon the construction of the agreement and the understanding of the parties: and, adopting that construction, the case is concluded by the money having been paid into Court under the provisions of the Lands Clauses Consolidation Act, for this was the mode of payment prescribed by the legislature, and provided for by the parties.

It was indeed argued, that the agreement was to be taken as a whole; and that, as to part of the unsettled lands, there has not yet been payment of the purchase-money:

(α) 1 Mac. & G. 336.

but, in addition to what I have already said, I think that the agreement must be construed severally.

1852.

Lewis

SOUTH WALTON  
v.  
RAILWAY CO.  
Judgment.

Great reliance was placed in argument on the case *Ex parte The Earl of Hardwicke* (a); but I think that case has no application to the present. The opinions of the Lords Justices in that case seem to have rested entirely on the special circumstances; and those special circumstances, as I understand the case, were the letter written, after the payment of the purchase-money into Court, giving notice that interest would be claimed, and the acquiescence of the Company in the demand made by that letter; but here there is a total absence of any such special circumstance, and, on the contrary, the account sent in August, 1849, was calculated to lead the Company to believe that interest would not be claimed beyond the 26th of May, 1849. I must, therefore, declare that the interest ceased on the payment of the purchase-money into Court; but, as I think there has been great delay on the part of the Company in paying this purchase-money, I shall give them no costs.

(a) 1 De G., Mac., & G. 297.

1852.

June 9th,  
July 28th.

A Railway Company, having contracted with a party, who, under a contract made some years previously, was a purchaser of land which the Company required for the Railway, but who had not paid his purchase-money, and appeared for some time to have abandoned the possession of the land, filed their bill for specific performance against both the vendor and purchaser:—*Held*, that, as the purchaser was not, after the lapse of time and under the circumstances, entitled in equity to a decree for specific performance of the contract against the vendor, the bill must be dismissed as against him, with costs; and as against the purchaser, without costs.

The rights of parties to agreements to enforce a specific performance in equity are not co-extensive; for their respective rights depend upon their conduct, and the conduct of one may give him the right to apply to the Court, while the conduct of the other may debar him from that right.

## SOUTH EASTERN RAILWAY COMPANY v. KNOTT.

A BILL against *William Knott* and *George Duerr*, for the conveyance of a piece of ground, containing about eighteen perches, agreed to be purchased by the Company from the Defendant *William Knott*, and on which, or part of which, the railway had since been constructed.

The plot of land was situated on the south side of *Spring-street, Deptford*. The agreement for purchase bore date the 1st of September, 1848, and was made between *Knott* of the one part, and an agent of the Company of the other part. *Knott* thereby agreed to sell, and the Company to purchase, the property described in the schedule, for the sum of 300*l*. The Company to be at liberty to take immediate possession, on depositing the purchase-money in the *London and Westminster Bank*, and to pay interest at 5*l*. per cent. from the time of taking possession. The purchase to be completed within three months; and thereupon the money to be paid to the vendor or otherwise, according to the Company's Acts; and if a valid conveyance should not be made to the Company within that period, the Company to be at liberty to pay the purchase-money into the Bank according to the Acts, and the interest to cease upon such payment. The schedule described the property as a piece of vacant ground near *Spring-street, Deptford*, containing eighteen perches. The Defendant *Duerr* was not a party to this agreement; but it appeared that, before the agreement was entered into, the Company had served both him and *Knott* with the usual notice that the lands were required, and the usual requisition to send in their claims;

equity are not co-extensive; for their respective rights depend upon their conduct, and the conduct of one may give him the right to apply to the Court, while the conduct of the other may debar him from that right.



and that, in consequence of the notice and requisition, *Duerr* had sent in a claim, demanding 500*l*. for the land; and it also appeared, that, the conveyance not having been completed according to the agreement, the Company paid the 300*l*. into the Bank to the following account:—

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 }  
 SOUTH  
 EASTERN  
 RAILWAY Co.  
 v.  
 KNOTT.  
 Statement.

“*Ex parte* The South Eastern Railway Company—The account of *William Knott*, claiming to be owner in fee simple of eighteen perches of land or ground situate near *Spring-street*, in the parish of *Deptford*, in the county of *Kent*, but failing to make title thereto except under a contract, bearing date the 30th of June, 1836, entered into by the said *William Knott* with *Frederick Duerr*, for the purchase thereof at the price of 73*l*. 10*s*.—And to the credit of *George Duerr*, who is the heir-at-law of the said *Frederick Duerr*, and also the administrator of the said *Frederick Duerr*; and of *Beriah Drew & George Drew*, solicitors of the said *Frederick Duerr*, who claim to have a lien or charge as solicitors on the said piece of ground or the title deeds relating thereto.”

Some proceedings were taken under the Acts with reference to the money thus paid in; and in consequence of those proceedings, and of *Duerr* having brought an ejectment to recover the land, this bill was filed. The effect of the evidence is stated in the judgment.

Mr. *Baily* and Mr. *Simpson* for the Plaintiffs.

Argument.

Mr. *Selwyn* for the Defendant *Knott*.

Mr. *Rolt* and Mr. *Speed*, for the Defendant *Duerr*, upon the lapse of time, cited *Alley v. Deschamp* (a) and *Guest v. Homfray* (b).

(a) 13 Ves. 225.

(b) 5 Ves. 818.

1852.  
 SOUTH  
 EASTERN  
 RAILWAY CO.  
 v.  
 KNOTT.  
 Judgment.

VICE-CHANCELLOR:—

The case made by this bill against the Defendant *Duerr* is, that he is the heir and personal representative of *Frederick Duerr*; and that, on the 13th of June, 1836, *Frederick Duerr*, by an agreement of that date, agreed to sell the land in question to *Knott*; and that the Defendant *Duerr* is a trustee under this agreement, and bound to convey to the Company. The Company's equity, therefore, wholly depends upon the equity of the Defendant *Knott* against the Defendant *Duerr*; and the true question is, whether *Knott* could now enforce the agreement of 1836 against *Duerr*. Of course, it could not be enforced at this distance of time, independently of the question of possession; but, in order to make out the right to enforce it, this bill alleges, that, upon the execution of the agreement of 1836, possession was delivered to *Knott*, and that he has ever since continued in possession of the land; and I think the evidence sufficiently proves the fact, that possession was delivered to *Knott* upon the execution of the agreement; but I think it fails to prove that he has ever since continued in possession. Several witnesses have been examined as to the possession, but the evidence of most of them goes principally, if not wholly, to the possession before the agreement of 1836 was entered into. The material witnesses who speak to the possession after the date of that agreement state, in effect, that *Knott* used the land as garden-ground for two or three years; that it then lay waste for some time; and that *Knott* then brought some bricks and scaffold-poles, and put up a fence, with a board having his name upon it, apparently intending to build; and that this was done about Christmas, before the New Building Act, which I find was passed in the year 1844; but these witnesses also state, that soon afterwards *Knott* took away the bricks and poles, and the fence was broken down; and that the land then again laid waste for a long

time—they say two or three years—before the railway was formed. There is also evidence, on the part of the Plaintiffs, that *Knott* was rated as occupier of the premises from 1839 to 1847; but it appears by the bill, that, in October, 1847, and January, 1848, he was not so rated; and the property was described in the rate-book as empty.

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EASTERN  
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v.  
KNOTT.  
Judgment.

In this state of circumstances, I am of opinion, that *Knott* could not have enforced the agreement of 1836 against *Duerr*. He had never paid any part of the purchase-money; and although he had had possession under the agreement, I think it clear that he had abandoned the possession long before his agreement with the Company was entered into; and it is scarcely less clear that the agreement of 1836 would never have been heard of but for the land having become valuable from the railway being about to pass over it. The jurisdiction in specific performance is discretionary; and, in my opinion, it would be a most unsound exercise of the discretion of the Court to enforce a specific performance under such circumstances as exist in this case.

It was argued on the part of the Plaintiffs, that *Knott*, having taken possession, and not having expressly repudiated the contract, could not have resisted specific performance at the suit of *Duerr*; and that, as the agreement could be enforced against him, it could equally be enforced by him: but I do not agree either to the hypothesis on which this argument rests, or to the conclusion deduced from it. I think, that, under the circumstances of this case, the agreement of 1836 could not have been enforced by *Duerr* against *Knott*; and I think, moreover, that in cases of this nature the rights of the two parties to call upon the Court to enforce the agreement are not co-extensive. The right of each party depends upon his conduct; and the conduct of one may give him the right to apply to the Court, while

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 SOUTH  
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the conduct of the other may debar him from that right. I am of opinion, therefore, that this bill must be dismissed against the Defendant *Duerr*; and as the Plaintiffs have established no right to sue him, I think it must be dismissed against him with costs. From the course taken at the hearing, I presume there will be no difficulty, as between the Company and the Defendant *Knott*; but if there be, I think, that, as the Company will not of course take a conveyance from him alone, the proper course will be to dismiss this bill against him without costs, and without prejudice; for this suit, as against him, is the consequence of his own claim.

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Nov. 15th &  
 16th;  
 Dec. 17th.

### BARHAM v. THE EARL OF CLARENDON.

An estate was devised to the eldest son of the testator, in fee, charged with four portions of 5000*l.* each for younger children. The eldest son, on his marriage, settled the estate to the use of his intended wife after his decease, for her life, if she should

**A SPECIAL case.**—*J. F. Barham*, who died in 1832, devised his *Stockbridge* estates to trustees, to raise 5000*l.* each for his sons *William* and *Charles*, and his daughters *Mary* and *Caroline*; and, subject thereto, he devised and bequeathed his real and personal estates to his son *John Barham*, his heirs, executors, &c., absolutely. By a settlement of January, 1834, made on the marriage of *John Barham* with *Lady Katharine Grimston*, *John Barham* covenanted, within six months after the solemnisation of the

survive him, with remainder to himself in fee, and covenanted within six months to pay off the four sums of 5000*l.* and release the estate therefrom. He paid off one sum of 5000*l.*, and died intestate. —*Held*, that the husband was not a purchaser under the settlement, and that the covenant in the settlement could not be taken to have been for indemnity only; but that, so far as the wife and younger children were concerned, the husband had adopted the portions as his own debt, and that he had also made them his debt as between his real and personal representatives.

When a man covenants upon his marriage to lay out money in the purchase of land, and to settle the land when purchased in favour of his wife and children, with remainder to himself in fee, the money is converted into land, not only in favour of the wife and children, but in favour of the heir also; and the heir may enforce the covenant where any of the uses of the settlement subsist at the death of the covenantor.

marriage, to pay off the said four sums of 5000*l.* and interest, and release the estates therefrom, and procure the *Stockbridge* estates and other estates to be conveyed freed and discharged from the said sums, to trustees, upon the trusts therein mentioned, until the marriage and during the life of *John Barham*; and, after his decease, to the use of *Lady Katharine Grimston*, in case she should survive *John Barham*, for her life, with remainder (after some uses which did not arise) to *John Barham* in fee. *John Barham* paid off the 5000*l.* to *Charles*, but not the three other sums. *John Barham* died in 1838, intestate and without issue, leaving *William* his brother his heir-at-law. *Lady Katharine* his widow, and his said two brothers and two sisters, were his next of kin and persons entitled to his distributive personal estate. *Lady Katharine* became his administratrix. *William* died in 1840, having devised and bequeathed his real and personal estate to *Charles* his brother, who thereby became entitled to the *Stockbridge* estates, subject to the life interest of *Lady Katharine* the widow, and to the remaining three sums of 5000*l.*

1852.  
 BARNHAM  
 &  
 EARL OF  
 CLARENDON.  
 Statement.

The *Lady Katharine* intermarried with the Earl of *Clarendon*; and the Earl and the Countess his wife were in receipt of the rents and profits of the *Stockbridge* estates.

The Countess of *Clarendon* paid the two sums of 5000*l.* to *Mary* and *Caroline*, the daughters of the testator *J. F. Barham*, under an agreement for the assignment of those sums, for the purpose of awaiting the determination of the Court on the question, whether the charges should be kept on foot for the benefit of the parties entitled to the personal estate of *John Barham*.

*Charles Barham* was the Plaintiff in the special case; and the Earl and Countess of *Clarendon*, and *Mary* and *Caroline* the two daughters of the testator *J. F. Barham*,

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 }  
 BARHAM  
 v.  
 EARL OF  
 CLARENDON.  
 —  
*Statement.*

and the parties interested under the settlements made upon their respective marriages, were Defendants. The case alleged that the Plaintiff and the Defendants were the only persons interested in the personal estate of *John Barham* the intestate; and the Defendants insisted that the personal estate of *John Barham* was not, as between the persons entitled thereto and the Plaintiff *Charles Barham*, as the owner of the reversion of the said *Stockbridge* estates, expectant on the determination of the life interest therein of the Countess of *Clarendon*, liable to pay the said three legacies of 5000*l.* each, remaining charged on the *Stockbridge* estates at the death of *John Barham*, or to exonerate the said estates therefrom; and that the Countess of *Clarendon*, as the administratrix of *John Barham*, was entitled, on payment by her of the legacies, as against the Plaintiff as such owner as aforesaid, to have the same legacies kept on foot as subsisting charges on the *Stockbridge* estates, for the purpose of making good to *John Barham's* personal estate the said three sums so paid thereout by her as such administratrix; and that, on the other hand, the Plaintiff, as the owner of the reversion, contended, that the personal estate of *John Barham* was primarily liable to exonerate the *Stockbridge* estates from the charges thereon; and that, under the circumstances, the Countess of *Clarendon* was not entitled to have the said legacies kept on foot.

The following questions were stated:—First, whether the personal estate of *John Barham* was or not, at the date of the agreement under which the payments had been made by the Countess of *Clarendon*, liable, as between the parties interested in the personal estate and *Charles Barham*, as the owner of the said reversion of the *Stockbridge* estates, to exonerate the *Stockbridge* estates from the three legacies remaining charged thereon at the death of *John Barham*, or any of them. Secondly, whether the Countess

of *Clarendon*, as administratrix, was or not, on payment by her of the three legacies, entitled, as against *Charles Barham* as the owner of the said reversion, to have the same legacies, or any of them, kept on foot as subsisting charges; and whether the same, or any of them, were subsisting charges on the *Stockbridge* estate for the purpose of recouping and making good to the personal estate of the said *John Barham* the said sums so paid thereout, or part thereof.

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BARMAN  
v.  
EARL OF  
CLARENDON.  
Statement.

Mr. *Rolt* and Mr. *Charles Hall*, for the Plaintiff, relied principally upon the covenant to discharge the *Stockbridge* estate, by which they contended that *John Barham* had made the portions his own debt: *Parsons v. Freeman* (a), *Donisthorpe v. Porter* (b), *Ex parte Earl Digby* (c), *The Earl of Oxford v. Lady Rodney* (d), *Barham v. The Earl of Thanet* (e), *Davenport v. Bishopp* (f), *Woods v. Huntingford* (g). They argued, moreover, that *John Barham* ought to be regarded as a purchaser under the marriage settlement: *Kekewich v. Manning* (h). They also submitted, that *John Barham* and his personal representative had, by the payments they had respectively made, shewn their own construction of the settlement to be, that the portions had been made the debt of *John Barham*; and that in fact the payment of one portion by *John Barham* himself was an adoption of the debt.

Argument.

Sir *W. P. Wood*, Mr. *Robson*, Mr. *Leach*, and Mr. *Jessell*, for the several Defendants, contended, that the covenant of

(a) 2 P. Wms. 664, n. (p).

(b) Amb. 600.

(c) Jac. 235.

(d) 14 Ves. 417.

(e) 3 My. & K. 607.

(f) 2 Y. & C. C. C. 451.

(g) 3 Ves. 128.

(h) 1 De G., Mac., & G. 203;  
Per L. J. *Knight Bruce*.

1852.  
 {  
 BARHAM  
 v.  
 EARL OF  
 CLARENDON.  
 —  
*Argument.*

*John Barham* was not intended to alter, and did not alter, the rights of any parties claiming under him in respect of his real or personal estate, but that the covenant was introduced only for the indemnity of the parties entitled to the portions: *The Earl of Ilchester v. The Earl of Carnarvon* (a), *Lechmere v. Charlton* (b), *Evelyn v. Evelyn* (c), *The Earl of Clarendon v. Barham* (d). If the wife had died without issue in the lifetime of the husband, and afterwards the husband died, it could not reasonably be argued that the heir of the husband could have enforced the covenant against his personal representative. The settlor could not be regarded as a purchaser under the settlement. On his part the covenant was voluntary; and it was therefore one which this Court would not enforce in favour of parties not within the consideration of the settlement.

*Judgment.*

VICE-CHANCELLOR:—

In determining the questions on this case, I think that the payment of the portions by *Lady Clarendon* must be laid out of the case; for the true meaning of the agreement entered into by the parties, as I understand it, is, that the rights of the parties shall not be prejudiced by the payment. The portions were to be paid; but the question, whether *Lady Clarendon* was entitled to have them kept alive against the estate, was to be submitted to the Court; and in the meantime they were to be assigned to trustees to abide the result.

The true point, therefore, which arises on both the questions is the same, and is shortly this,—whether the Plaintiff, as the devisee of the heir of *John Barham*, is or is not

(a) 1 Beav. 209.

(b) 15 Ves. 193.

(c) 2 P. Wms. 659, 664.

(d) 1 Y. & C. C. C. 188.



entitled to have the estate exonerated from the portions at the expense of *John Barham's* personal estate. It is contended on his part, that he is so entitled, even if the covenant contained in the settlement is to be taken as to him to be voluntary; but it is said, that he ought to be considered as a purchaser under the settlement. On the other hand, it is contended on the part of *Lady Clarendon* and the next of kin of *John Barham*, that the Plaintiff cannot be considered as a purchaser under this settlement; and that, taking him to be a volunteer merely, he has no equity to be exonerated from the portions; and they insist that the covenant was for a special purpose,—the exoneration of the estate from the portions in favour of the wife and younger children only.

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**BARHAM**  
*v.*  
**KARL OF CLARENDON.**  
*Judgment.*

I think that the Plaintiff's claim to be considered as a purchaser under the settlement cannot be maintained. I do not think it could have been maintained if the ultimate limitation had been to the heirs of the husband; for the wife could hardly be considered to stipulate for the husband's heirs: but here the ultimate limitation is to the husband himself in fee; and surely the wife cannot be considered to stipulate for him. I am of opinion, therefore, that the case must be determined without reference to any claim of the Plaintiff as purchaser.

Several authorities were referred to in the argument; but I then thought, and I still think, that those authorities do not govern the present case. They were principally cases, either of covenants for payment of mortgage-money, entered into by heirs or devisees on the transfer of the mortgages, or by purchasers of estates subject to mortgages upon the completion of their purchases; and those cases have settled that such covenants, standing by themselves, do not constitute the mortgage debt the proper debt of the heir or purchaser, as between his representatives.

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 {  
 BARHAM  
 v.  
 EARL OF  
 CLARENDON.  
 —  
*Judgment.*

To give them that effect, would be to cast burthens upon the estates of parties who were under no original liability; and there being, in all such cases, other reasonable grounds for the covenants being entered into, the Court will not, from the mere fact of the covenants having been entered into, impute to the parties the intention to take such burthens upon themselves; but the intention may, nevertheless, be proved by other circumstances connected with the transaction. The other cases cited, which were cases of indemnity, rest upon the same footing.

It was attempted, indeed, on the part of the Defendants, to bring this case within these latter authorities, by insisting that the covenant in this settlement was for indemnity only; but the covenant here is not merely to pay the portions within a limited time, but to convey the estate discharged of the portions; and it cannot therefore, as I think, be considered as a covenant of indemnity merely. There is this distinction between the cases cited in the argument and the present case:—In the cases cited, the single question was, whether the heir or devisee had adopted the debt and made it his own; but, in the present case, it is not disputed, that, so far as the wife and younger children are concerned, *John Barham* adopted the portions as his debt; and the single question is, whether he has made them his debt, as between his real and personal representatives. I am of opinion that he has.

Where a man covenants upon his marriage to lay out money in the purchase of land, and to settle the land when purchased in favour of his wife and children, with remainder to himself in fee, the money is converted into land, not only in favour of the wife and children, but in favour of the heir also; and the heir may enforce the covenant where any of the uses of the settlement subsist at the death of the covenantor. This was expressly decided in

*Lechmere v. The Earl of Carlisle* (a). The question there was,—was the money impressed with real uses in favour of the heir as against the personal representative—could the heir call for investment of the money in land? In the present case the question is,—is the money to be paid by the personal representative in relief of the heir—can the heir call for payment? I do not see how a different principle can be applied to the two cases, or how different decisions upon them could stand together. Again, the Plaintiff's case is much assisted by what is said in *Goring v. Nash* (b) and *Davenport v. Bishopp* (c) against the splitting of the limitations; and, upon these grounds, my opinion is, that the declarations in this case must be in favour of the Plaintiff.

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BARNHAM  
v.  
EARL OF  
CLARENDON.  
Judgment.

It was argued for the Defendants, that, if *Lady Clarendon* had died without issue in the lifetime of *John Barnham*, the covenant could not have been enforced by the heir. But the answer to this argument is, that the case would then have been wholly different. All the uses of the settlement would have been exhausted, and the money would have been at home in the hands of the covenantor.

(a) 3 P. Wms. 211.

(b) 3 Atk. 180,

(c) 2 Y. & C. C. C. 461; 1 Ph. 698, S. C.

1852.

June 25th.

## IN THE MATTER OF POWELL'S TRUST.

Interest not allowed on the arrears of an annuity, and the discretion of this Court on the question is not affected by the stat. 3 & 4 Will. 4, c. 42, s. 28.

The cases of *Hyde v. Price*, and *Cross v. Bedingfield* referred to their special circumstances.

THE question was, whether interest ought to be allowed upon the arrears of an annuity of 31*l.* 2*s.* 6*d.*, granted by *William Thorogood* to *Thomas Gould*. The annuity was granted by a deed dated the 26th of April, 1834, and secured by an assignment of a reversionary interest in part of the funds in question in this matter, expectant on the decease of *Ann Powell*, and to which *Thorogood* was contingently entitled in the event of his surviving her. *Ann Powell* died on the 24th of November, 1851, and the annuity was then considerably in arrear. By the deed of the 26th of April, 1834, *Thorogood* granted the annuity in the usual form, payable quarterly during the lives of *Thorogood* and four other persons, and the life of the survivor of them; and the reversionary interest was assigned to *Gould*, upon trust for sale in case the annuity should be unpaid for a certain number of days beyond any or either of the days of payment, and to stand possessed of the money to arise by the sale upon trust to pay or retain the costs of the sale, and the costs and charges incurred by *Gould* by reason of the non-payment of the annuity, and the arrears and future payments of such annuity, or, at the option of *Gould*, to lay out the monies in the purchase of another annuity of a similar amount. The deed contained a covenant for the payment of the annuity, and for the appearance, during the life of *Ann Powell*, of the persons for whose lives the annuity was granted, for the purpose of life assurance. And it was provided, that, if any extra premium should be required, the amount of the same, with interest, should be raisable under the trusts; and there was a proviso for redemption of the annuity. The annuity was also further secured by a warrant of attorney to confess judgment for 599*l.* and costs.

*Mr. Freeling, Mr. J. H. Palmer, Mr. Southgate, and Mr. Shadwell* appeared for the different parties.—The cases of *Taylor v. Taylor* (a), *Booth v. Leycester* (b), *Hyde v. Price* (c), and *Crosse v. Bedingfield* (d), were cited; and the stat. 3 & 4 Will. 4, c. 42, s. 28, enabling juries to give interest upon debts, was also referred to.

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In re  
POWELL'S  
TRUST.  
—  
Argument.

VICE-CHANCELLOR:—

I am of opinion that interest cannot be allowed upon the arrears of this annuity. I think the case is governed by the decisions in *Booth v. Leycester* (b), which were approved by the present Lord Chancellor in *Martyn v. Blake* (e).

Judgment.

It was attempted to support the claim for interest upon the provisions of the statute 3 & 4 Will. 4, c. 42, s. 28; but the statute does not appear to me to affect the question; for this Court, before the passing of the statute, exercised some discretion as to allowing or not allowing interest on arrears of annuities; and I see no reason why the statute, which merely gives powers to juries to allow interest if they shall think fit, vesting some discretion in them, should be taken to have altered the rules by which the discretion of this Court was guided; and besides, the case of *Booth v. Leycester* was decided after the passing of the statute.

The cases of *Hyde v. Price* (c) and *Crosse v. Bedingfield* (d) were also cited in support of the claim; but there were specialties in each of those cases. In *Hyde v. Price* the claim was for interest, not on the arrears of the annuity as they accrued, but on the aggregate amount of the

(a) 8 Hare, 120.

(b) 3 My. & Cr. 459.

(c) 8 Sim. 578.

(d) 12 Sim. 35.

(e) 3 Dr. & War. 125.

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In re  
POWELL'S  
TRUST.

—  
Judgment.

arrears at the death of the surviving grantor of the annuity, as due upon the judgment; and for many years after the death of the surviving grantor there had been no person who could have been sued upon the judgment. There had also been a decree to take the account with interest; and the case too was decided before the decision upon the appeal of *Booth v. Leycester*. In *Crosse v. Bedingfield* it might well be considered that the debtor, by setting up the destruction of the bond, had unjustly impeded the recovery of the annuity. These cases must, I think, be referred to the special circumstances which attended them; for, in the later case of *Jenkins v. Briant*(a), the late Vice-Chancellor of *England* adopted the decision in *Booth v. Leycester*.

The covenant with reference to insurance was also referred to in support of the claim; but that covenant appears to me to tell more against than in favour of the claim; the reservation of interest upon any monies which might be paid by way of premium upon the policy, shewing that, where the parties contemplated the payment of interest, they made it the subject of express stipulation. My decision, therefore, is, that interest is not payable upon the arrears of this annuity.

(a) 16 Sim. 272.

1852.

## EX PARTE THE BISHOP OF WINCHESTER.

June 4th.

THE *London and South Western Railway Company*, in 1851, purchased, for the purpose of their railway, lands in the parish of *Overton*, in the county of *Southampton*, belonging to the see of *Winchester*, and which had been demised on several leases, for lives and years, to *John Portal* and *William Portal*. The Company paid into Court the sum of 1034*l.* 10*s.* ; and the Bishop conveyed the lands to the Company and their successors and assigns by a conveyance dated the 29th of December, 1851.

The Bishop of *Winchester*, the lessor of lands of the see, demised for lives and years, held not to be entitled to any portion of the purchase-money, and compensation for damage and severance, paid into Court in respect of lands comprised in the demise, and taken by a Railway Company, or to the dividends of such money when invested, on the ground of the diminution of the fine which would be payable,—until the lease should become renewable.

The Bishop of *Winchester* presented his petition, stating, that about eight acres of the land taken by the Company were comprised in a lease of 1092 acres, dated the 21st of June, 1831, and made to *William Portal*, for the lives of three persons therein named; and that the remainder of the land so taken, being also about eight acres, was comprised in a lease dated the 8th of April, 1844, and made to *John Portal* for the term of twenty-one years from the 5th of April, 1844; that it had been customary to renew the lease upon the death of either of the cestuaries *que vie*, upon payment to the Bishop of *Winchester* for the time being of a competent sum of money by way of fine, calculated on the net annual value of the estate at the time, ascertained by a survey and valuation thereof: that the net annual value of such estate at the time of granting the lease was 510*l.* 6*s.* 8*d.*, or thereabouts; and that the fine paid to the petitioner, the Bishop, on such renewal, was 2800*l.*, for adding the names of *Melville Portal* and *Robert Portal* in the place of the two lives deceased; that the total quantity of land comprised in and demised by the lease of the 8th of April, 1844, was 937 acres, with the buildings thereon; that it was and had been customary

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*Ex parte*  
BISHOP OF  
WINCHESTER.

Statement.

to renew the lease of the lands comprised therein at the expiration of every four years of the term, and it became renewable accordingly on the 5th of April, 1848; but in consequence of the death of the lessee (and from other causes not known to the Bishop) the same was not renewed till the 14th of October, 1851, seven years of the term of twenty-one years having expired on the 5th of April, 1851, and a fine of 1140*l.* was then paid to the Bishop for granting such new lease for twenty-one years from the 5th of April, 1851; which sum was calculated on a valuation of the estate, made in June, 1848, by the Bishop's surveyor, who then reported the gross annual value thereof, exclusive of the land so taken by the Railway Company, and comprised in the lease, at 733*l.* 3*s.* 5*d.*: that the said fine was calculated on the net annual value (at the time of granting such lease,) of 570*l.*; that the Bishop's surveyor, in November, 1848, surveyed and valued the pieces of land taken for the *Basingstoke* and *Salisbury* Railway, and settled the amount of purchase-money and compensation to be paid to the Bishop by the Company in respect thereof as follows, viz. the sum of 500*l.*, as the amount of purchase-money for the said lands, and the sum of 534*l.* 10*s.*, as the amount of compensation in respect of all consequential or other loss, damage, injury, and inconvenience, caused, occasioned, or suffered, by reason of the severance of the land, or otherwise, in the execution of the powers of the Acts, making together the sum of 1034*l.* 10*s.*; and that the said surveyor settled the aforesaid amount of purchase-money and compensation, considering the Bishop to be entitled to, and that he would receive, the dividends to accrue due thereon when invested according to the Act; and that such dividends would represent the petitioner's interest, and the personal interest of the Bishop of *Winchester* for the time being, in so much of the fine as would otherwise have been received by the petitioner in respect of the land taken by the Company, when and so often as



the said leases should be renewed; and that no part of such purchase-money and compensation of 1034*l.* 10*s.* was set apart for or in respect of the petitioner's personal interest in respect of the future renewals of such leases respectively; but that the Company paid the petitioner the sum of 61*l.* 2*s.*, as the amount of his personal interest in the said lease of the 8th of April, 1844, at the time the said land was taken by the Company, the same being then renewable, by reason of four years of the term thereby granted having expired; that, unless the Bishop and his successors should receive the annual income of the Consols to be purchased with the 1034*l.* 10*s.*, they would receive no compensation for the loss of such proportion of the fines payable on the renewal of such leases respectively as would have been apportionable to the several pieces of land taken by the Company; and that the petitioner would have been entitled to and would have received a larger fine on granting such renewal or lease of the 14th of October, 1851, if the Company had not taken the eight acres of land formerly comprised in the said lease.

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*Ex parte*  
 BISHOP OF  
 WINCHESTER.  
*Statement.*

The petition prayed that the 1034*l.* 10*s.* might be invested in Consols, and that the dividends thereon might, from time to time, be paid to the Bishop and his successors until the further order of the Court.

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Mr. *Speed*, for the petition.

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The VICE-CHANCELLOR expressed his opinion to be, that the Bishop was not entitled to any portion of the 1034*l.* 10*s.*, or the dividends to accrue upon the stock to be purchased therewith, until the lease or leases respectively, in which the several parcels of land taken by the Company

*Judgment.*

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*Ex parte*  
 BISHOP OF  
 WINCHESTER.  
 Judgment.

were comprised, should become renewable; and that, when the leases or either of them became renewable, the Bishop might apply for the payment out of the fund of the deficiency of the fine occasioned by the diminution of the quantity and value of the land comprised in the renewed lease or leases.

*Minute.*

LET the 1034*l.* 10*s.*, cash in the Bank, to the credit &c., be laid out in the purchase of Consols, "The account of the Bishop of Winchester for the time being;" and let the interest to accrue due, &c., and all accumulations of interest, be, from time to time, as and when the same shall amount to a competent sum, laid out in the purchase of like stock, subject to the further order of this Court; and let the rest of the said petition stand over: and any of the parties are to be at liberty to apply.

Feb. 10*th*,  
 11*th*;  
 June 25*th*;  
 July 6*th*.

TIDD *v.* LISTER.  
 BASSIL *v.* LISTER.

A married woman, whose husband did not maintain her, held not to be entitled, as against a particular assignee of the husband, to maintenance out of the income of the real and personal estate to which she was entitled in equity for her life.

TWO petitions, presented by *Elizabeth Tidd*, the first in the lifetime of her husband *William Tidd*, the second, after his decease. The claim of the petitioner arose out of the following facts: *Josias Lister*, by his will, dated in 1803, gave all his real and personal estate to trustees, amongst

to maintenance out of the income of the real and personal estate to which she was entitled in equity for her life.

As against purchasers for value from the husband, of the life-interest of the wife, equity will follow the law, which gives to the husband the power of dealing with the income of his wife's property, and will not put in force the rule that he who comes into equity must do equity, whereby purchasers would be involved in inquiries into the relations between husband and wife, their property and means of maintenance.

Distinction between the cases in which a wife takes an absolute interest in her property, and those in which she takes a life-interest only, and between cases of an assignment by the husband of the wife's property to his general assignee on his bankruptcy or insolvency, and of an assignment to a particular assignee for value.

Monies coming to the hands of the receiver in a cause in which the husband and wife are parties, might be considered as not reduced into possession by the husband; but where the husband has created incumbrances on the property in which he became interested in right of his wife, and the Court has ordered the monies to be applied in favour of the incumbrancers, the effect is to divest the title, and reduce into possession the monies which were the subject of the order.

whom were his sons *W. Lister* and *J. Lister*; and he directed that his wife *Elizabeth*, and his daughter *Elizabeth*, during their joint lives, or the survivor of them, should have and occupy the house he resided in, the furniture, &c.; that the aforesaid devise should not extend to any money, bank bills, bonds, or notes of hand, that might be in and about the house, and he proceeded: "And that all such, with my other personal property that I may leave, with any expectancy, I direct and will, that it may be put out into Government security, the interest whereof, with all the rents and profits of freehold, copyhold, or leasehold property that may happen to come in; that the proceeds, after all my just debts and funeral expenses are paid, and also the insurance from loss or damage by fire of the whole of the premises that I may die possessed of, and all policies of insurance on lives; after all which has been performed, then I give the remainder of my profits, rents, or interests, or in expectancy, of whatsoever kind, to my wife and daughter *Elizabeth*, for their lives, or the survivor of them; but first paying out of the said profits, rents, or interest, as before mentioned, two annuities of sixty guineas each to my two sons *William* and *John*; and should either of them die before my wife and daughter, in that case, one moiety of the said annuity should be enjoyed by my wife and daughter, and the other by my surviving son; that, should both die without leaving issue, then for the whole of my property, both real and personal or expectancy, to revert back to my wife and daughter, and to be at their, or the survivor of their disposal, for ever; and if, on the contrary, my son or sons should survive my wife and daughter, on such an event happening, it is my will, that the whole of my real and personal property and expectancy should be equally divided between them, share and share alike."

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 v.  
 LISTER.  
 BASIL  
 v.  
 LISTER.  
 ———  
*Statement.*

The testator died on the 1st of November, 1803, leaving

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 {  
 TIDD  
 v.  
 LISTER.  
 BARRIL  
 v.  
 LISTER.  
 —  
*Statement.*

his wife and his daughter, the petitioner, who was then unmarried, surviving him. His property consisted of freehold and copyhold estates, and of personal estate. In 1805, the petitioner, the daughter, married *W. Tidd*; and it did not appear that any settlement was made of her interest in the property of the testator. In 1819, the testator's widow died.

In March, 1820, *W. Tidd* and his wife (the petitioner) filed their bill for the execution of the trusts of the will. By the decree in the cause, dated the 19th of December, 1820, accounts were directed to be taken; and it was referred to the Master to appoint a receiver of the freehold and copyhold estates; and the receiver was ordered, out of the rents and profits, to pay the premiums on three policies of life insurance left by the testator, and also on the policies of insurance on the houses, and any additional premiums that might be payable; and the receiver was directed from time to time to pass his accounts, and pay in the balances which should be reported due from him; and the appointment of such receiver was to be without prejudice.

An order was afterwards made in the cause, dated the 6th of May, 1822, by which it was ordered, that the Defendant *William Lister* should, after retaining his costs, pay to *W. Tidd* and *Elizabeth* his wife the residue of a sum of 367*l.*, in his hands, and should transfer into Court 177*l.* 8*s.*, 4*l.* per cent. stock; and that the Defendant *William Lister*, who was one of the testator's executors, should receive the dividends to accrue on the stock previous to such transfer, and pay the same to *W. Tidd* and *Elizabeth* his wife; and that the dividends to accrue on the 177*l.* 8*s.* stock should be paid to the receiver; and that the receiver should pay the balance of the rents and profits of the estates, and of the dividends which should be reported due

from him, after deducting the premiums payable on the several policies of insurance to *W. Tidd* and *Elizabeth* his wife, or to *Elizabeth Tidd* alone, in case she should survive her husband, during her life, or until the further order of the Court. By this order the parties were let into the receipt of the income, subject to the annuities and premiums directed to be paid thereout. And a similar order, dated the 21st of November, 1827, was made upon the appointment of a new receiver.

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v.  
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v.  
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Statement.

In the meantime, by deeds of lease and release, dated in September, 1820, the release made between *William Tidd* and *Elizabeth* his wife of the first part, *H. Blegborough* of the second part, and *J. Arundel* of the third part, and by means of a fine levied by *W. Tidd* and *Elizabeth* his wife, the freehold estates of the testator had been conveyed to *Blegborough* for the life of *Elizabeth* the wife, for securing an annuity of 127*l.* 10*s.*; and, by these deeds, *W. Tidd* covenanted for the surrender of the testator's copyhold estates, for better securing the annuity; and (as stated at the bar) the testator's personal estate was thereby purported to be assigned for further securing it.

By an order, dated the 18th of January, 1834, it was ordered, that, out of any monies in the hands of the receiver, and which might thereafter come to his hands, in respect of the rents, profits, and dividends of the real and personal estate of the testator, after providing for the several payments directed to be made by the order of the 6th of May, 1822, the receiver should pay to *Blegborough* the sum of 120*l.* 10*s.*, the arrears due to him upon his annuity, and the costs of the application; and that, after first providing for the several payments directed to be made by the order of the 6th of May, 1822, the receiver should pay to *Blegborough*, out of the rents, profits, and dividends of the said real and personal estate, the annuity of 127*l.* 10*s.*, as the

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same should become due and payable. *Blegborough's* annuity was afterwards assigned to *H. and J. Phillips*; and by an order of the 1st of November, 1834, the annuity was ordered to be paid to them instead of to *Blegborough*.

The life interest of *Elizabeth Tidd* in the testator's freehold estates was also, previous to March, 1834, charged by deed and fine, in favour of *Mary Tidd*, with the sum of 2,100*l.* and interest, and the premiums on a policy of insurance for that amount, which had been effected on the life of *Elizabeth* the wife. The deeds creating this charge had contained a covenant for the surrender of the testator's copyhold estates, but no surrender was ever made in pursuance thereof.

By an order of the 21st of March, 1834, the receiver was directed, out of the monies then in his hands in respect of the rents and profits of the real estate of the testator, after providing for so much of the several payments directed to be made by the previous orders as the monies then in his hands on account of the personal estate of the testator would not extend to satisfy, to pay to *Mary Tidd* the sum of 613*l.* 12*s.*, due to her on the 25th of October, 1833, for arrears of interest on the 2100*l.*, and also the costs of the application, or so much thereof as such monies should be sufficient to satisfy; and the receiver was ordered thereafter, out of the rents and profits of the real estate, after providing for so much of the several payments directed to be made as the monies from time to time in his hands on account of the personal estate would not extend to satisfy, to pay the annual premiums on the policy on the life of *Elizabeth Tidd*, as therein mentioned, and out of the residue of such monies, from time to time in his hands, to pay to *Mary Tidd* the interest which should accrue on the 2100*l.*, and also so much of the 613*l.* 1*s.* 2*d.*, and the said costs, as should not be paid by the means therein mentioned.

*Mary Bassil* afterwards became entitled to the benefit of *Mary Tidd's* securities; and thereupon an order, dated the 4th of August, 1837, was made in the cause in favour of *Mary Bassil*, which was similar to the order of the 21st of March, 1834, in favour of *Mary Tidd*.

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TIDD  
v.  
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BASSIL  
v.  
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—  
*Statement.*

*John Brettel*, one of the persons on whose life the testator had effected a policy of insurance, having died, and the monies due upon the policy effected on his life having been received by *William Lister*, the executor, another order was made on the 4th of June, 1839, by which he was ordered to pay the sum into Court; and it was ordered, that, when paid in, the interest, and interest to accrue due on the stock when transferred, should be paid to the receiver, to be applied by him, together with the first mentioned interest, after satisfying the costs as before directed, in aid of the monies receivable by him pursuant to the directions of the decree and the several orders relating to the interest and dividends of the personal estate of the testator.

In this stage of the case, questions were raised by *Mary Bassil* as to the validity of the trust created by the testator's will for keeping on foot the policies of insurance, and also as to the priority of *Blegborough's* annuity. These questions were afterwards heard and disposed of (a).

Pending these proceedings, the first of these petitions was presented by *Elizabeth Tidd*, by her next friend, her husband being then living. In addition to the facts before stated, the petition alleged that the freehold property of the testator consisted of certain lands and hereditaments at *Wellingborough*, and of a messuage in *Islington*, producing an annual income of 154*l.* 4*s.*: That part of the copyhold property, consisting of certain houses and land

(a) See 9 Hare, 177.

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*Statement.*

at *Finchley*, was lately sold to the *Great Northern Railway Company* for 1530*l.*, which was paid into Court and invested, in trust in the cause, in 1707*l.* 2*s.* 3*d.* Consols: That the copyhold property of the testator consisted of lands and hereditaments at *Hornsey* and *Finchley*, producing an annual income of 198*l.* 8*s.*: That the personal estate, other than such part thereof as had been set apart to secure the annuities payable under the will, consisted of certain sums mentioned, producing a clear annual income of 32*l.* 17*s.* 1*d.*: That the total annual income arising from the testator's real and personal estate (after payment of the annual premiums and other sums of money now payable under the decree of the 19th of December, 1820), amounted to 359*l.* 5*s.* 11*d.*: That the whole of the income since the death of *Elizabeth Lister* had been received by the petitioner's husband *W. Tidd*, and his creditors and incumbrancers: That, since 1826, *W. Tidd* had been in insolvent and very indigent circumstances, and had not in any manner contributed to the maintenance or support of the petitioner; and the whole of the income arising from the testator's real and personal estate had, in fact, been received by the incumbrancers and creditors of *W. Tidd*, and the petitioner had been left, and was, wholly destitute; that *W. Tidd* was then receiving parochial relief, and an inmate of the workhouse: That the petitioner had had issue by her husband five children, three of whom, one daughter and two sons, were then living and unprovided for: That the petitioner was and had been for many years entirely supported by her daughter, who had hitherto obtained her living by dressmaking and needlework; but that her earnings were very precarious, and oftentimes insufficient to provide herself and the petitioner with the common necessities of life: That the petitioner was of the age of sixty-six years, and confined to her bed by illness, and without the means of providing medical advice; and the petitioner, therefore, prayed that the re-



ceiver might be directed, notwithstanding the said several orders, forthwith to pay to the petitioner, out of any monies in his hands, the sum of 50*l.*, upon her sole receipt, for her immediate necessities and support, such payment to be made without prejudice to the rights or claims of all parties: That the receiver might be directed, notwithstanding the same orders, to pay the residue of the income arising from the testator's freehold, copyhold, and personal estates respectively, to the petitioner, for her separate use, and upon her sole receipt, for her support and maintenance during the life of her husband; or if it should appear that the estate, right, and interest of the petitioner of and in the freehold hereditaments, or any part thereof, had been duly and effectually conveyed by the petitioner, so as to defeat her right to a provision out of the income arising from the same, then that the receiver might be directed, after providing for such payments as aforesaid, to pay the whole income arising from the copyhold and personal estates of the testator, and the income arising from such part, if any, of the freehold hereditaments as should not have been so conveyed, to the petitioner, as aforesaid; or that the Court would approve of a proper sum to be allowed out of the said testator's freehold, copyhold, and personal estates, for the support and maintenance of the petitioner during the life of her husband, having regard to the circumstances; and that, in the meantime, the receiver might be directed to discontinue the several payments directed to be made by the several orders thereinbefore stated; and that such orders might, if necessary, be re-heard and varied or discharged.

The petition came on to be heard in August, 1851, and was then ordered to stand over, it being supposed that the decision upon it might be affected by a case which was standing for judgment before the Lord Chancellor.

1852.  
TIDD  
v.  
LISTER.  
BASSEL  
v.  
LISTER.  
—  
*Statement.*

1852.

TIDD

v.

LISTER.

BASSIL

v.

LISTER.

*Statement.*

Whilst the first petition was thus standing over, *William Tidd*, the husband of the petitioner, died; and thereupon the second petition was presented, stating, in addition to what was stated by the former petition, that *W. Tidd* was, at the time of his death, a pauper lunatic in *St. Pancras Workhouse*, and that he had not, since 1820, in any way contributed to the maintenance and support of the petitioner: That the petitioner was advised, that, on the death of her husband *W. Tidd*, all his right and interest, and all the right and interest (if any) of *Mary Bassil*, and of any other person claiming through or under *W. Tidd*, of, in, or to the income arising from the testator's freehold, copyhold, and personal estate, ceased; and that the petitioner became entitled to receive such income, subject to the payment of the premiums on the policies effected by the testator on the lives of the said *W. Lister* and *J. Lister* respectively, and of the annual sum or sums of money required for insuring the houses against fire, and to the annuities given by the will, and subject also, as to the income arising from the freehold estate, to the payment to *H. and J. Phillips* of the annuity of 127*l.* 10*s.*; And after stating that the receiver had paid that annuity, and had also paid to *Mary Bassil* the annual premium of 106*l.* 9*s.* 9*d.* in respect of the policy effected by her on the life of the petitioner, including such annual premium as became due in July, 1851, it stated that the receiver had in his hands 290*l.* 17*s.* 8*d.*, being the balance of his receipts and payments in respect of the testator's freehold, copyhold, and personal estate, from the 29th of September, 1850, to the 29th of September, 1851: That the receiver had not paid any sum of money on account of the testator's freehold, copyhold, and personal estate since the 29th of September, 1851: That, under the circumstances, the 290*l.* 17*s.* 8*d.* ought to be paid to the petitioner; but that the same was claimed by *Mary Bassil*: That two several sums of 2100*l.* Bank 3*l.* per Cent. Annuities had been

set apart to answer the annuities of sixty guineas payable to *W. Lister* and *J. Lister*: That those annuities were by the will charged upon and made payable out of the incomes arising from the testator's freehold, copyhold, and personal estate respectively, and not solely out of the income of the personal estate; and that the sum of 42*l.* 15*s.* 7*d.* was the proportion or amount of the annuities which ought to be paid out of the income arising from the testator's freehold estate. The petition prayed that the costs might be taxed and paid out of the balance in the receiver's hands, in respect of the income of the testator's freehold, copyhold, and personal estate, received by him previously to the 29th of September, 1851; and that the receiver might be directed to pay the residue of that sum to the petitioner, and out of the rents and profits and income of the freehold, copyhold, and personal estate, to be received by him as from the 29th of September, 1851, rateably and in proportion to the respective amounts, from time to time, to pay the annual premiums on the policies of insurance; and that the receiver might be directed to pay the income of the testator's copyhold and personal estate, which should remain in his hands after payment of the proportionate amounts of such sums to the petitioner for her life; and that the receiver might also be directed to pay to her the sum of 42*l.* 15*s.* 7*d.* out of the rents of the freehold estates, and out of the residue of those rents to pay *Phillips's* annuity.

1852.

TIDD

v.

LISTER.

BASIL

v.

LISTER.

Statement.

Mr. *Stuart* and Mr. *Leach*, for the petitioner *Elizabeth Tidd*, upon the first petition, insisted on her equity to a settlement, or a provision for maintenance out of her life interest in the property. The authorities now decided that any party claiming under the husband, whether a general or particular assignee, stood in the same situation as the husband, and took subject to all the equities of the

Argument.

1852.

TIDD

v.

LISTER.

BASSIL

v.

LISTER.

*Argument.*

wife. The principle laid down by Lord *Alvanley* in *Pryor v. Hill*(a) and *Macaulay v. Philips*(b) being fully established, it followed, as a necessary corollary, that the assignee for value of the life estate of the wife could not be in a better position than the assignee for value of a capital sum. Both took equally under the husband, subject to the wife's equity, whenever she might choose or need to assert it. That there was no distinction between a life interest and capital would clearly appear, when it was considered that the Court did not give the capital to the wife in any case, but merely a life interest in that capital.—*Sturgis v. Champneys*(c), *Hanson v. Keating*(d), *Wortham v. Pemberton*(e), *Ashby v. Ashby*(f), *Wilkinson v. Charlesworth*(g), *Gardner v. Marshall*(h), *Gilchrist v. Cator*(i), *Greedy v. Lavender*(k), *Stiffe v. Everitt*(l), and *Whittle v. Henning*(m), were also cited. Upon the second petition, they contended, that the wife was entitled by survivorship, the property not having, as they argued, been reduced into possession by the husband. And lastly, they contended that the freehold and copyhold estate should bear a rateable proportion of the charges, and that they should not be thrown in the first instance on the personal estate.

Mr. *Bethell*, Mr. *Rolt*, and Mr. *Eddis* for the Plaintiff  
Mrs. *Bassil*.

Mr. *Walker* and Mr. *Hardy* for Messrs. *Phillips*.

The cases of *Stanton v. Hall*(n), *Elliott v. Cordell*(o), and

(a) 4 Bro. C. C. 138.

(b) 4 Ves. 15.

(c) 5 My. &amp; Cr. 97.

(d) 4 Hare, 1.

(e) 1 De G. &amp; S. 644.

(f) 1 Coll. 553.

(g) 10 Beav. 324.

(h) 14 Sim. 575.

(i) 1 De G. &amp; S. 188.

(k) 13 Beav. 62.

(l) 1 My. &amp; Cr. 37.

(m) 2 Ph. 731.

(n) 2 Russ. &amp; My. 175.

(o) 5 Madd. 149.

*Vaughan v. Buck* (a), were mentioned on the argument for the respondents.

Mr. *Leach* replied.

1852.  
TIDD  
v.  
LISTER.  
BANKS  
v.  
LISTER

VICE-CHANCELLOR:—

The question raised by the first petition is, whether a married woman, whose husband does not maintain her, is entitled, as against a particular assignee for valuable consideration of the husband, to an allowance for her maintenance out of the income of real and personal estate, to which she was entitled in equity for her life. This question seems to have been first suggested by Sir *William Grant* in *Wright v. Morley* (b), where, after referring to Lord *Alvanley's* opinion on the general question, whether there is any difference between an assignment for valuable consideration and by operation of law, he says: "If it stood there, there is no doubt the husband has a right to deal with it so long as he maintains her; and there is no doubt of his right to make a specific disposition if he maintained her. That leads to the question, whether, in case of abandonment, by the husband ceasing to maintain his wife, there is an equity for her to have her own life interest laid hold of by this Court, supposing it not reduced into possession by the husband,—being still in the hands of the trustees. One question is, whether that is settled merely as between husband and wife, and putting third persons out of consideration; if so, the second point is, whether this equity prevails, where, previously to the abandonment, the husband has made an assignment of his wife's interest, or any part of it. That question, so far from being decided, has not even been made the gist of a case. It therefore deserves a great deal of considera-

*Judgment.*

(a) 1 Sim., N. S., 284.

(b) 11 Ves. 12.

1852.

TIDD

v.

LISTER.

BASSIL

v.

LISTER.

Judgment.

tion" (a). In that case, however, the question was not necessary to be and was not decided; but it was afterwards fully argued before and considered by Sir *John Leach* in *Elliott v. Cordell* (b), and his decision was against the right of the wife; and that decision was approved and acted upon by Lord *Brougham* in *Stanton v. Hall* (c). It would require, therefore, some very clear principle, or some very decisive authority, to warrant me in arriving at a different conclusion.

It was strongly argued in this case, as it was in *Elliott v. Cordell* (b), that there could be no distinction between the cases in which the wife took a life interest only, and those in which she took an absolute interest, in which latter cases her right to a settlement was fully established against the assignee of her husband for valuable consideration; and that there could be no distinction between the particular assignee for value of the husband, and his general assignee in bankruptcy or insolvency: but there are distinctions between these cases which cannot be disregarded.

In the cases where the wife takes an absolute interest, the provision is for her and her children. She cannot claim it for herself alone. In the cases where the wife takes a life interest, the provision is for her separate benefit, independently of the children, a distinction pointed out by Sir *William Grant* in *Wright v. Morley*. Again, in the cases where the wife takes an absolute interest, her right to a provision for herself and her children is independent of the acts and conduct of her husband; in the cases where she takes a life interest only, her right to a provision for herself arises from the non-fulfilment by him of his obligations, and is wholly dependent upon his acts and conduct. In the cases too where the wife takes an absolute interest,

(a) 11 Ves. 18.      (b) 5 Madd. 149.      (c) 2 Russ. & My. 175.

the purchaser takes subject to a well-known and settled equity; but where the wife takes for life only, the equity by which it is said the purchaser must be bound, may not exist at the time of his purchase, and, depending as it does on the conduct of the husband, may never come into existence: and in this respect also there is a great distinction between the particular assignee for value and the general assignee; for in the case of the general assignee the very bankruptcy or insolvency on which his title is founded creates the right against him. Considering the question without reference to the authorities, it must, as I conceive, resolve itself into this point: ought a Court of equity in these cases, against purchasers for value, to follow the law which gives to the husband the power of dealing with the income of his wife's property, or ought it to put in force its ordinary rule, that he who comes into equity must do equity, the rule on which, as I believe, both the rights of married women to provisions for their maintenance and their rights to settlements are founded.

In determining this point, the inconveniences which would ensue from the Court's acting upon the rule to which I have referred, must not, I think, be thrown out of view. Purchasers would become involved in inquiries into the relations between husband and wife, the extent of their other property, and their other means of maintenance; and the life interests of married women would become incapable of being dealt with, whatever might be the exigencies of the case. Looking to these consequences and to the distinctions which I have pointed out, and not of course intending the observations which I have made to apply to a case of fraudulent alienation for the purpose of defeating the claims of the wife, I must confess myself unable to find any clear principle on which I can dissent from the decisions to which I have referred.

1852.

TIDD

v.

LISTER.

BASSIL

v.

LISTER.

*Judgment.*

1852.

TIDD

v.

LISTER.

BACELL

v.

LISTER.

Judgment.

It is to be considered, then, whether those decisions are affected by subsequent cases. It does not appear to me that they are. Many cases were cited in the argument, but they were principally cases in which the wife had taken an absolute interest; and in those in which she had taken a life interest, the question was between her and the general assignees of her husband. No case was cited in which the question had been between the wife and the assignee of the husband for value. *Vaughan v. Buck* (a), before Lord *Cranworth*, was relied on; but that was a case between the wife and the general assignee of the husband. Much reliance was also placed on the observations of Lord *Langdale* in *Wilkinson v. Charlesworth* (b); but that was a question between the representative of the husband and the wife surviving; and Lord *Langdale's* observations seem to have been directed against what had fallen from the late Vice-Chancellor of *England* in *Vaughan v. Buck* (c), as having indicated a doubt whether the wife could in any case be entitled to a provision for maintenance out of her life interest. His Lordship could not, I think, have intended to say, that in every case, and as against every person, she would be so entitled; for in *Wright v. Morley* (d), to which he refers, Sir *William Grant* puts the wife's right to a provision on the absence of her husband and his having left her unprovided for, and directed an inquiry as to these points before he would make the order in favour of the wife. Indeed, I can find no case in which a wife has come to the Court for such a provision except under special circumstances; and certainly no case in which she has succeeded in obtaining it against an assignee for value of her husband.

It was attempted to maintain this petition upon the

(a) 1 Sim., N. S., 284.

(b) 10 Beav. 324.

(c) 13 Sim. 404.

(d) 11 Ves. 17.



ground that the wife's interest was reversionary within the principle of *Stiffe v. Everitt* (a); but that case goes no further than that the wife's interest, after the determination of the coverture, might be deemed to be reversionary, and does not therefore affect the question as to the income accruing during the coverture. My opinion therefore is, that the first of these petitions must be dismissed; but, having regard to what fell from the Court in *Wilkinson v. Charlesworth* (b), I must dismiss it without costs.

1862.  
TIDD  
v.  
LISTER.  
BASSEL  
v.  
LISTER.  
—  
Judgment.

The first question raised by the second petition is as to the right of the petitioner to a sum of 290*l.* 17*s.* 8*d.* in the hands of the receiver, being the balance of his receipts and payments in respect of the testator's freehold and copyhold and personal estates, from Michaelmas, 1850, to Michaelmas, 1851. The petitioner claims to be entitled to this sum by survivorship; but I am of opinion that she is not so entitled. The question depends upon whether these monies are to be considered as having been reduced into possession by the husband; and if the case had rested upon the monies having come to the hands of the receiver, I think it would have been difficult for the incumbrancers to have resisted the petitioner's claim to them; but these monies have been ordered by the Court to be applied in favour of the incumbrancers, which is in effect for the use of the husband, by whom the incumbrances were created; and I think the orders of the Court must be considered to have divested the title of the petitioner and destroyed her right by survivorship.

Upon this part of the case a question of marshalling was discussed: Whether the payment which had been made on account of *Blegborough's* annuity ought not to be referred to the income of the personal and the rents of the

(a) 1 My. & Cr. 37.

(b) 10 Beav. 324.

1852.  
 TIDD  
 v.  
 LISTER.  
 BASSIL  
 v.  
 LISTER.  
 ———  
*Judgment.*

copyhold estate, so as to leave the 290*l.* 17*s.* 8*d.*, in the hands of the receiver applicable for the benefit of Mrs. *Bassil*; but my opinion being, that the sum in question does not survive, and is applicable according to the orders already made by the Court, this question does not arise. The petitioner is not of course bound by her husband's covenant for the surrender of the copyholds, or by his assignment of her interest in the personal estate.

The remaining question upon the second petition is, whether the petitioner is entitled to have the premiums upon the policies of insurance and the annuities apportioned upon and borne by the rents and income of the freehold estates, the copyhold estates, and the personal estate, *pro ratâ*; or whether the personal estate is primarily liable for these payments. And, upon this point, I consider the case to be bound by the decision of the House of Lords in *Boughton v. Boughton (a)*, where it was held, that the primary liability of the personal estate was not altered by a trust for the payment of legacies out of the rents and profits of real and personal estate. I see no reasonable ground of distinction between that case and the present; and I feel myself bound, therefore, to hold, that the personal estate is, in this case, primarily liable for these payments.

There was no argument upon the point, how the deficiency of the income of the personal estate for the payment of the premiums ought to be made good; and the amount is so inconsiderable, that I think the parties will be well advised not to agitate the question, but to allow it to be taken out of the income of the copyholds.

The order, therefore, will be—to dismiss the first petition,

(a) 1 H. L. Cas. 406.

without costs; to give no directions as to the 290*l.* 17*s.* 8*d.*, leaving it to be dealt with according to the former orders; to order the receiver to keep distinct accounts of the rents of the freeholds, and of the copyholds, and of the income of the personalty; to direct the rents of the freeholds from the death of *W. Tidd* to be applied, first, in payment of *Phillips'* annuity and of the costs of the petitions, and then the surplus to be paid to *Mary Bassil*, for the purposes mentioned in the former orders; to direct the income of the personalty, and (the parties not objecting) the rents of the copyholds, from the death of *William Tidd*, to be applied first in payment of the premiums, and then the surplus to the petitioner.

1852.  
TIDD  
v.  
LISTER.  
BASSIL  
v.  
LISTER.  
Judgment.

The petitioner's costs of the petitions must be paid out of what is coming to her, and *Mrs. Bassil's* must be added to her incumbrance.

A question was then raised, as to the right of *Mrs. Bassil* to have the charge to which the *Phillips's* were entitled, as against both the freehold and the copyhold estate, marshalled, so as to satisfy that charge out of the copyholds, as far as they would extend, leaving *Mrs. Bassil* to realise her charge out of the freeholds, so far as they should not be required for the payment of the annuity to Messrs. *Phillips*, or, in other words, on the right of *Mrs. Bassil*, whose charge extended to the freeholds only, to stand in the place of the *Phillips's* as to the copyholds, to the extent in which they should take satisfaction out of the freeholds.

One party having a charge on freehold and copyhold estate, and another party on the freehold estate only, it was held that the latter was entitled to require that the former should be satisfied out of the copyhold estate, so far as it would extend.

VICE-CHANCELLOR:—

I have looked through the cases on this subject. The reason I suspended giving my opinion was, that several cases had been decided since *Aldrich v. Cooper* (a), and I

July 6th.

(a) 8 Ves. 382.

1853.

TIDD

v.

LISTER.

BASSIL

v.

LISTER.

*Judgment.*

did not know whether those cases had affected it. On looking into the cases, I am satisfied that the decision in *Aldrich v. Cooper* is not affected by the subsequent cases; and I am of opinion, that, assuming the security of the *Phillips's* to be a good security on the copyhold property (which, if there be any question, must be verified by affidavit), there must be a marshalling in the present case; and that Mrs. *Bassil* is entitled to have Messrs. *Phillips* paid out of the copyhold estate, so as to leave the freehold estate for her; and then the petitioner Mrs. *Tidd* will take any surplus of the income of the copyholds.

Nov. 9th &  
10th;

Dec. 1st.

Cases in which, the residuary estate of one testator having devolved upon another, it is proper to join the executors of the first testator in a suit to administer the estate of the second, and to take the accounts of both estates in one suit.

## YOUNG v. HODGES.

THE circumstances of this case were very special and complicated, and are not necessary to be stated for the purpose of explaining the rule laid down in the judgment with reference to the cases in which it is proper to administer two estates in the same suit.

See *Powell v. Cockerell*, 4 Hare, 557.

Mr. *Rolt* and Mr. *Cairns* for the Plaintiff; and

Sir *W. P. Wood*, Mr. *Baily*, Mr. *Collins*, and Mr. *Freeling* for the Defendants.

*Judgment.*

VICE-CHANCELLOR:—

At the hearing of the cause, the frame of the record, as involving the accounts of the estates both of *J. Webster*

the father, and *J. Webster* the son, in one suit, was much objected to on the part of the Defendants, the representatives of *Forshaw*; but this objection, having been raised at the hearing of the cause, and not by demurrer for multifariousness, is to be disposed of according to the discretion of the Court; and I see nothing in the case which ought to prevent the Court, in the exercise of its discretion, from dealing with both the estates in this suit. I think, indeed, that these estates have been so dealt with that it would have been difficult to maintain the objection of multifariousness, had it been taken by demurrer. Where the residuary estate of one testator devolves upon another testator, the executors of the first testator may, I think, well be joined in a suit for the administration of the estate of the second testator, in all cases in which there have been such dealings between the two sets of executors as would prevent the rights of the parties suing from being fully and fairly worked out, if the suit for the administration of the estate of the first testator were brought by the executors of the second; and this case must, I think, have been held to fall within that rule. I am of opinion, therefore, that the usual accounts of the estates of both these testators must be taken in this suit.

The Plaintiffs further insisted, that there should also be an account of the estate of *J. Webster* the elder received by the Defendant *Hodges*, who was the executor of *J. Webster* the younger, but did not represent the estate of *J. Webster* the elder; and I am of opinion that this account must be directed. It does not indeed fall within the usual accounts; but, looking to the answer and the evidence, I think that this Defendant has intermeddled with the estate of *J. Webster* the elder to such an extent that the account is clearly due.

1852.  
 }  
 YOUNG  
 v.  
 HODGES.  
 —  
*Judgment.*

1852.

July 3rd.

## KENNERLEY v. KENNERLEY.

Bequest of the testator's property to his wife to bring up and educate his children, and when they should come of age, to settle on them what she should deem prudent, reserving to herself a sufficient maintenance; and, at her death, the property remaining to be equally divided amongst his children; with a gift to trustees for the children, in case of the marriage of his widow:

—*Held*, that the widow took a life-interest in the property, with a power to settle or appoint the same on or to the children of the testator, but not on or to his grandchildren; and that the children took vested interests in the property, at the testator's death, liable to be divested by such appointment.

THE questions in the cause arose on the will of *Samuel Kennerley*, dated in 1814, which was in the following words:—"I hereby give and leave to my dearly beloved wife *Alicia Kennerley* the whole of my estate, personal and real, to bring up and educate my children, and when they come of age to settle on them what shall be deemed by her prudence, reserving to herself a sufficient maintenance. But if my said wife should again marry, my will is, that *Mr. Thomas Page* should, in that case, become trustee for my children, so that my property may not be subject to the control of such husband. And I hereby appoint my dear beloved wife whole and sole executrix, so long as she remains unmarried. What property remaining at my wife's death to be equally divided amongst my children."

The testator left a son and four daughters. *Sarah*, one of the daughters, married *J. Boyes*, and died in the lifetime of the widow, leaving two children. The widow made advancements of portions of the fund to several of the children, and executed an appointment of the residue in favour of the other children, including *Mrs. Boyes*, who was then living, to whom she gave a life interest, with remainder to her children.

The widow died in 1849. The bill was filed by one of the surviving daughters, for the execution of the trusts of the will.

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Sir *W. P. Wood* and Mr. *Bushell* for the Plaintiff, claimed the share of the property attempted to be appointed to the

grandchildren of the testator as unappointed, and divisible amongst the children: *Kennedy v. Kingston* (a), *Duke of Northumberland v. M'Gregor* (b).

1852.  
KENNEDY  
v.  
KENNEDY.  
Argument.

Mr. *Hughes* for Defendants in the same interest.

Mr. *V. Neale*, for the children of Mrs. *Boyes*, contended that the direction given by the testator to his widow to settle on the several children what she should, in her discretion, deem to be prudent, was, in effect, a power to make such a settlement on the children of the testator for their lives, with remainder to their children, as the testator might himself have made if he had thought proper to do so, instead of delegating his power to his wife: 2 *Jarman's Wills*, 253 et seq., and cases there cited.

Mr. *Anderson* for the trustees.

VICE-CHANCELLOR:—

I think the shares of the children vested at the death of the testator. The limitations, taken altogether, are, I think, equivalent to a gift to the widow for life, with remainder to the children, with a power to the widow to appoint among such children as she may select. The testator directs his widow to settle what she shall "deem prudence," reserving maintenance for herself. She was to have maintenance only out of the whole property.

Judgment.

As to the question, whether there could be an appointment in favour of grandchildren, I am of opinion that the testator throughout his will contemplated children, and children only. The will is obscure in point of expression, but this appears to me to be clear: Suppose the widow

(a) 2 J. & W. 431.

(b) 5 Bell, App. Cas. 396.

1852.  
 KENNERLEY  
 v.  
 KENNERLEY.  
 —  
*Judgment.*

had died, leaving all the children under age, to whom would all the property go? It was to go to the trustee, and upon trust for children, not for grandchildren. It is also equally clear, that, if the widow married again, all the children being under age, the property was to go to the trustee, and he was to hold it for the children only, and not for the grandchildren. The cases cited from *Jarman* contained larger expressions than are found in this will. The question turns not on the meaning of the word settlement generally, but on the meaning of the word "settled." In this will, I am of opinion that it means a gift to the children.

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*Minute.*  
 —

DECLARE that, according to the true construction of the will of the testator, his widow was entitled, for her life, to his personal estate, with power to settle or appoint the same on or to his children; and that, in default of appointment, so much thereof as remained unappointed became divisible on the death of the said *Olivia Kennerley* amongst all the testator's children. Declare that the trusts in the indenture of 1837, [describing the property,] operated as, and were, a good and valid settlement or appointment in favour of the children of the said testator. (Directions to carry the same into effect). Declare that the trusts in the said indenture in favour of the children of *Sarah Boyes* are void; and that, in the events that have happened such [property so attempted to be appointed] became divisible, on the death of the widow, into five equal shares, &c.



PAGE v. COX.

**T**HOMAS PAGE, the testator, carried on the business of a boot and shoe maker, and, at the date of his will, he was solely interested in that business. By his will, dated the 18th of August, 1832, he gave certain specific legacies, and devised and bequeathed the residue of his real, leasehold, and personal estate unto and to the use of the Defendant *Cook* and another, upon trust to convert into money such parts of his residuary personal estate as should not consist of leasehold premises or money in the funds, and to invest the produce thereof, and the ready money of which he should die possessed, as therein mentioned, and during the life of his wife *Sarah Page* to pay the rents and profits of his said real and leasehold estate, and the dividends and annual produce of such investments, and of all such stocks, funds, and securities, as he might be possessed of at the time of his decease, unto the said *Sarah Page*, for her separate use, without power of anticipation; and, after her decease, during the life of *Mary Elizabeth Green*, his wife's sister, to pay the said rents and profits, dividends, and annual produce unto the said *Mary Elizabeth Green*, for her separate use, without power of anticipation; and after the decease of the survivor of *Sarah Page* and *Mary Elizabeth Green*, to convey, assign, and make over the said real and leasehold estates, stocks,

partnership, leaving a widow surviving, such widow might, if she should think fit, continue to carry on the partnership business with the surviving partner, and should be entitled to the testator's share in the profits and excess of capital; and if the testator should leave no widow, or his widow should not desire to enter into the business, or if the other partner should die during the partnership, the surviving partner to take upon himself the partnership business and property, accounting and paying for the same as therein directed. The testator died, leaving his widow, who, under this provision, claimed his interest in the partnership:—*Held*, that the provision in the articles took the testator's share of the business wholly out of the provisions of the will, and that the widow became entitled, under the partnership articles, to such share.

A trust may well be created in the absence of any expression importing confidence; and the obligation on the surviving partner created by the partnership articles, with reference to the legal interest in the partnership, did not in substance differ from a trust, and therefore the articles of partnership created a trust in favour of the wife, to arise on the death of the testator leaving a widow surviving, which would attach on the property as it should then exist.

1851.

Nov. 18th;

1852.

April 20th.

A tradesman bequeathed his residuary estate, including his stock in trade, to trustees, with a direction to convert into money all such parts as should not consist of leaseholds or money in the funds; and to invest the same and pay the annual income to *Sarah* his wife; and after her decease, to *Mary*, his wife's sister; and after the decease of the survivor of *Sarah* and *Mary*, he gave his residuary estate to another person absolutely. After the date of the will *Mary* married, and her husband and the testator entered into partnership, under articles, which contained a proviso, that if the testator should die during the

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COX.*Statement.*

funds, and securities, and other his residuary personal estate, to *William Page*, his heirs, executors, administrators, and assigns.

Some time after the date of the will, and before December, 1839, *Mary Elizabeth Green* married *James Shattock*; and on the 24th of December, 1839, the testator entered into partnership with *Shattock*. Articles of partnership, dated the 24th of December, 1839, were entered into between them, whereby, after reciting that *Page* had agreed to take *Shattock* into partnership with him in his said business, it was agreed that the partnership should commence on the 25th of December, 1839, and continue for the term of their joint lives, determinable on twelve months' notice by either party: that the present stock-in-trade of *Page*, including his shop-fixtures, tools, and implements of trade, which had been valued at the sum of 1000*l.*, should be taken as capital to that amount brought into the partnership by *Page*; that any future capital required should be brought in by the partners in equal moieties; that during the continuance of the partnership the stock-in-trade should not be reduced below 1000*l.*: That *Shattock* should devote his whole time and attention to the business; but *Page* should not be required to devote his whole time or attention to it. The articles also contained a proviso, that, in case *Page* should die during the partnership leaving a widow him surviving, such widow might, if she should think fit, continue to carry on the partnership business with *Shattock*, upon the terms and conditions contained in the articles, in the same manner as *Page* could have done whilst living; and such widow should be entitled to *Page's* share and interest of and in the profits of the business, and also to the share and interest, including excess of capital (if any) of *Page*, of and in the property, stock, credit, and effects of the partnership; or if *Page* should die leaving no widow, or, leaving such,

she should die, or should not desire to enter into the partnership business, or if in case *Shattock* should die during the said partnership, then the surviving partner should take upon himself the whole of the partnership property, stock, and effects, and give sufficient security to the personal representatives of the deceased partner for their indemnification against the debts due from him as surviving partner, and for the due accounting with and paying to such representatives, within six months after the death of such deceased partner, of his share, including excess of capital (if any) of and in the property, credits, and effects of the partnership, the same to be ascertained; and the accounts of the partnership in case of disagreement to be adjusted by arbitrators, to be appointed in manner thereafter mentioned; and upon the performance, by the surviving partner, of the terms and conditions of the articles on his part, the personal representatives of the deceased partner should release, assign, or otherwise assure to the surviving partner all the deceased partner's share and interest in the partnership property, stock, and effects; and that the expense of and attending all bonds, deeds, and other instruments necessary for effecting the purposes aforesaid, should be sustained equally by the surviving partner and the representatives of the deceased partner.

The testator died on the 4th of September, 1840, leaving *Sarah Page*, the wife mentioned in his will, his widow; and all the executors proved his will. On the death of the testator, his widow claimed under the articles of partnership to become a partner with *Shattock*, and to be entitled to the testator's share in the profits and capital of the business; and *Cook*, as executor of the testator, then also claimed to be entitled to the testator's share and interest in the partnership business. The widow, however, became partner with *Shattock* in the business, and continued in partnership with him until April,

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*Statement.*

1841; at which time she sold to *Shattock* what had been originally the testator's share of the capital and stock for 1000*l.*, and of the goodwill for 200*l.*; and immediately afterwards she married *Philip Cox*.

The bill was filed by *William Page*, the party entitled in remainder under the testator's will, against *Cox* and his wife, and *Shattock* and his wife, and against *Cook*, the surviving trustee of the will, for the administration of the testator's estate; and the sole question discussed at the hearing was, what were the rights and interests of the parties in the testator's share and interest in the business; the Plaintiff contending that the Defendant *Sarah Cox*, the testator's widow, did not become entitled to it under the articles of partnership; and that, if she became entitled to it under the articles, she was bound to elect between her interest in it and the other provisions made for her by the will.

*Argument.*

Mr. *Bethell* and Mr. *Lewin* for the Plaintiffs; and Mr. *Prior* for the Defendants *Shattock* and his wife.

No trust was created of the share of the testator on behalf of his widow, nor could it be regarded as in the nature of an advancement for her benefit. Nothing was done to preserve the partnership property from any disposition which the testator might make of it by any act in his lifetime, or by his will; and the provision in the articles, such as it was, did not point to any particular person. It was a stipulation, that "any widow he might leave should be admitted as a partner." There was, therefore, no certainty of subject or of object to create a trust. The purpose of the clause was to enable the partner to bequeath to his widow the right of becoming a partner, but not to make her necessarily a partner: *Pigott v. Bag-*

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—  
Argument.

ley (a). One partner covenanting with another, that a son or other member of his family should become a partner in case of his own decease, did not thereby give the son or other person designated a right, as against the representatives of the deceased partner, to become a partner in his stead, if he made no disposition of his share in favour of such person: *Colyear v. Countess of Mulgrave* (b). The articles of partnership did not amount to any assignment or disposition of the testator's share to which the Court could give effect: *Edwards v. Jones* (c), *Meek v. Kettlewell* (d). There was, moreover, nothing in the case which even purported to be a donation in favour of the wife. The testator did no more, dealing with his partner, than reserve a power to himself to give his widow the benefit of the partnership contract. He might have given this benefit by his will, but he did not: on the contrary, the will, speaking from the time of his death, made a different disposition of his property, including the partnership property. It could not be contended, that the partnership articles amounted to a revocation or ademption of the gift by the will.

Mr. Rolt and Mr. Cole, for the Defendants Cox and his wife, contended, that the articles of partnership created a trust on behalf of the testator's widow, in respect of his share of the partnership property: *Ellis v. Nimmo* (e), *Christ's Hospital v. Budgin* (f), *Dummer v. Pitcher* (g).

The case of *Kekewich v. Manning*, which had been argued on appeal before the Lords Justices, and then stood for judgment, was also cited; and the Vice-Chancellor reserved his decision until the judgment of the Lords Justices was pronounced (h).

(a) M'Cl. & Younge, 569.

(b) 2 Keen, 81.

(c) 1 My. & Cr. 226.

(d) 1 Ph. 342; S. C., 1 Hare,

464.

(e) Ll. & G. temp. Sugd. 333.

(f) 2 Vern. 683.

(g) 2 My. & K. 262.

(h) See 1 De G., Mac., & G.

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VICE-CHANCELLOR:—

As to the first point, the right of the widow under the articles, I am of opinion that she became entitled under them to the testator's share in the business. This question depends wholly on the effect of the articles. Up to the time of the articles being executed, the testator had the sole legal interest in the business, and in the capital and stock embarked in it. Upon the articles being executed, that legal interest vested in both partners, and became subject, upon the death of either of them, to vest in the survivor. The clause upon which this question depends takes up that event, and provides for its happening either by the death of the testator or by the death of *Shattock*; and, in the case of its happening by the death of the testator, refers to several contingencies under which it may happen—the testator's leaving or not leaving a widow,—the widow dying,—her electing to continue or not to continue the business. In all the events contemplated by the clause, the interest of the deceased partner is dealt with by it, and is so dealt with in connection with the interest of the surviving partner; and the effect of the clause cannot, I think, be stated lower than that it was an agreement by both parties, that, upon the death of either of them, his share should be dealt with according to the provisions which the clause contains.

We have to consider, then, what is the effect of such an agreement. Is it not to create an obligation in equity upon the surviving partner, in whom the legal interest would be, and was contemplated as being, vested; and in what respect does such an obligation differ from a trust? I see no difference between them; and I am of opinion, therefore, that, in the event which happened, these articles created a trust in favour of the widow; and I have less difficulty in so holding, as I consider it to be now settled

in *Kekewich v. Manning* (a), that, in cases of this nature, the Court is to regard the substance and effect and not the mere form of the instrument; and that a trust may well be created, although there may be an absence of any expression in terms importing confidence.

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 Judgment.

It was argued that this was a mere case of contract between two persons for the benefit of a third party, and that the third party could not enforce such a contract; and *Colyear v. Countess of Mulgrave* (b) was cited upon that point. But it seems to have been considered in *Kekewich v. Manning*, that that case was not free from doubt; and, at all events, I think it is distinguishable from the present case. In that case, the creation of the fund on which the trust was to be fixed, in part depended upon the enforcement of the covenant, and neither of the parties had the legal interest in the other part of the fund; and it was considered, whether rightly or not is not material, that the whole was executory: but here the legal interest in the property dealt with was vested in one of the parties to the contract; and the contract was entered into with reference to that interest devolving upon the other party; and I can see nothing to make the contract executory. It might, indeed, have been put an end to by a dissolution of the partnership during the joint lives, under the notice provided by the articles, but it subsisted until so determined. A trust certainly cannot be the less capable of being enforced because it is founded on contract.

It was further argued, that there could be no intention in this case to create a trust, because the trust, if created, would interfere with the interim dispositions of the property; but the answer to this argument is, that the trust

(a) 1 De G. Mac. & G. 176.

(b) 2 Keen, 81.

1882.

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COX.

*Judgment.*

was to arise at a future time, and to attach upon the property as it should then exist; and I apprehend that it might well be so created.

Some argument was also founded on the reference in the articles to any widow of the testator, and not to his then wife only; but this argument appears to me to be rather against than in favour of the Plaintiff, for no widow could take under the testator's will except his then wife; and if she had died, and he had married again, there would have been no provision for the second wife, except by the articles; and it would, therefore, be a reasonable, if not necessary, intendment that his design was to provide for her by the articles. I think further, that the relation of the parties and the ordinary habit of providing for members of a family by stipulations in partnership articles, is not to be disregarded in determining this question; and the view which I have taken of it is, I think, much strengthened by considering how it would have stood if the executors of the testator had, upon his death, filed a bill to wind up the concern, or to compel *Shattock* to give security for the testator's interest, the widow having elected to continue the business. Surely it would have been a sufficient answer on his part to have said, he had stipulated for the testator's capital continuing in the concern if the widow should elect to continue it, and she had made the election.

There remains, then, the question as to the obligation of the widow to elect, and I think she is not bound to do so; for I think that the testator, by the provisions of the articles of partnership, has taken his share of the business wholly out of the provisions of the will. It is true that he had bequeathed his stock in trade, and that the stock in trade at his death, if it had continued to be his, would have passed by the will; but he had alienated it: and I can-



not read his will as intended to dispose of that which he had parted with.

The decree, therefore, must be, to declare, that, upon the death of the testator, the widow became entitled, under the articles of partnership, to the testator's share and interest in the profits of the business, and also to his share and interest, including excess of capital, if any, of and in the property, stocks, credits, and effects of the partnership, and that the plaintiff did not take and has not any right or interest therein under the will of the said testator: and to direct the usual accounts.

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Cox.

Judgment.

IN THE MATTER OF MORES' TRUST.

1851.

August 7th;  
Nov. 4th.

THE testator, by his will, dated the 19th of February, 1829, after bequeathing some leasehold premises to trustees, upon trust to pay the rents to his daughter *Caroline* for her life for her separate use; and, after her decease, upon trust for her children who should be living at the time of her death; and, in default of such issue, upon trust

By a will property was given to trustees, to apply the rents, interest, and proceeds for the maintenance of the testator's son *Edward* for his life, and not to be

paid to any person under an assignment by or execution against the son; and after the decease of the son, for the two daughters of the testator absolutely. By a codicil, it was declared, that, in case of assignment by *Edward*, the trustees should stand possessed of the property upon trust for the daughters of the testator, in the same manner and form as declared by his will in the event of the death of *Edward*. By another codicil, the testator gave 600*l.* stock to *Edward*, in addition to what he had left him by his will, subject to the same controlling powers and restrictions as were appointed by the will; and he gave a like sum to his son *William*, subject to the like control, "and to the survivor of them, and in the event of both their deaths" for the benefit of the said daughters:—*Held*, that the true construction of the second codicil was, that, in the event of the death of either of the legatees, both the legacies of stock should go to the survivor, and not that on the death of either his legacy should go to the survivor, which would cut down an absolute gift into a life interest. That, although in one codicil the words "in the event of the death of *Edward*" meant upon the death of *Edward*, it did not follow that the words in another codicil "in the event of both their deaths" meant upon both their deaths; for one expression was applied to a life interest and the other to a capital sum: That the period of survivorship must be referred to the period of distribution, namely the death of the testator: That, therefore, *Edward*, having survived the testator, took the legacy of stock absolutely.

The rule, that added legacies are subject to the same conditions as the legacies to which they are added, is not applicable to the case, inasmuch as the application of the rule would alter the terms of the additional gift. And whether the rule applies to any cases except where the original legacy is absolute or defeasible in the party to whom the additional legacy is given—*quære*.

1852

*In re*  
**MORRES' TRUST.**

*Statement.*

for her executors or administrators, devised and bequeathed to the same trustees a freehold messuage at *Peckham*, and a policy of insurance on his life, upon trust to invest the money to be received upon the policy, and to pay and apply the rents and profits, interest, dividends and proceeds of the freehold messuage, and of one moiety of the monies to be produced from the policy, to and for the maintenance and support of his son *Edward Rowe Mores* during his life, to be paid to him at such time or times, and in such manner, as the trustees should, from time to time in their discretion think fit, declaring it to be his express will and meaning, that the rents and profits, interest, dividends, and proceeds, so directed to be paid for the support and maintenance of his son *Edward Rowe Mores*, should not be paid to any person or persons under any assignment to be made by his said son, or to any assignee or assignees under any Insolvent Act, or commission of bankruptcy, or under any execution or extent which might at any time be issued against him, but that the same should be solely and exclusively for such his support and maintenance; and after the decease of his son *Edward Rowe Mores*, he directed the trustees to stand seised and possessed of the freehold messuage and of the moiety of the monies to be produced from the policy, upon trust for the only use and behoof of his daughters *Elizabeth* and *Selina*, their heirs, executors, administrators and assigns, for ever. The testator then devised and bequeathed to the same trustees some freeholds or closes of land and some turnpike bonds, and the other moiety of the monies to arise from the policy upon trusts for the benefit of his son *William George Mores*, which were expressed in the same words as the trusts before mentioned in favour of his son *Edward Rowe Mores*; and after the decease of his son *William George Mores*, he directed these parts of his property also to be held upon trust for the only use and behoof of *Elizabeth Mores* and *Selina Mores*,

their heirs, executors, administrators and assigns; and he then gave the residue of his estate, both real and personal, to *Elizabeth Mores* and *Selina Mores*, absolutely; and appointed *Elizabeth Mores* and *Robert Willy* his executors.

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In re  
Mores' Trust.  
Statement.

By a codicil to his will, dated the 6th of May, 1833, the testator, after reciting that he had by his will devised and bequeathed to the trustees the freehold messuage at *Peckham* and the policy of insurance, upon trust, to pay and apply the rents of the messuage, and the interest of the monies to arise from the policy, for the maintenance and support of his son *Edward Rowe Mores* for his life, to be paid to him in the manner in his will particularly expressed, declared that in case his said son should assign such rents, profits, or interest, or should become insolvent under any Insolvent Act or commission of bankruptcy, or should any execution or extent be issued against his goods or effects, by any of which means the said rents, profits, or interests should be sought to be obtained for the benefit of any creditor, that then, and in either of the said cases, the trustees should stand seised and possessed of the said messuage and the money to be received from the policy of insurance, upon trust for the only use and behoof of *Elizabeth Mores* and *Selina Mores*, their heirs, executors, administrators, and assigns, in the same manner and form as declared by his will, in the event of the death of the said *Edward Rowe Mores*.

The testator made another codicil to his will, dated the 9th of October, 1840, by which he bequeathed to his son *Edward Rowe Mores*, in addition to what he had already left him by his will, 600*l.* 3*l.* per cent. Consols, subject also to the same controlling powers, orders, restrictions, and directions of his trustees, as were appointed by his said will; and to his son *William George Mores*, subject to the like control, as exercised by his said trustees, in addition to

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 Mores' Trust.  
 Statement.

what he had already left him by his will, a further bequest of 600*l.* 3*l.* per cent. Consols, "the same as his brother, and to the survivor of them, and, in the event of both their deaths, to the sole use and behoof of" his daughters *Elizabeth* and *Selina*. Another codicil, dated April, 1842, contained nothing material to the question in the petition. A fourth codicil was dated the 2nd of October, 1844, and thereby the testator gave to his son *William George Mores*, subject to the like control, order, restrictions, and directions of his trustees, in addition to what he had already left him, his leasehold estate in *Park-street*, held under Lord Grosvenor, subject to a ground rent of 24*l.* per annum; and in the event of his death, to the sole use and behoof of the daughters *Elizabeth* and *Selina*.

The testator died in April, 1846. *Edward Rowe Mores* died in March, 1850. And his legacy of 600*l.* Consols having been transferred into Court, a petition was presented by *Elizabeth* and *Selina*, praying that the Court would determine on the construction of the codicil of the 9th of October, 1840, and direct the fund and the dividends accrued upon it since the death of *Edward Rowe Mores* to be transferred and paid to the person entitled thereto.

Argument.

Mr. *Hallett* for the petitioners.

The *Solicitor-General* and Mr. *Willcock* for the other parties.

The following cases were cited, on the construction of the words "in the event of the death of *Edward*," and "in the event of both their deaths:" *Billings v. Sandom* (a),

(a) 1 Bro. C. C. 393.

*Lord Douglas v. Chalmer* (a), *Webster v. Hale* (b), *Slade v. M'ner* (c), *Tilson v. Jones* (d), *Smart v. Clark* (e).

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In re  
MORSE TRUST.

VICE-CHANCELLOR:—

The question raised by the petition relates to the legacy of 600*l.* Consols, in which *Edward Rowe Mores* was interested; and the points argued were, whether he was absolutely entitled to the legacy of 600*l.* Consols; and, if not, whether, upon the death of *Edward Rowe Mores*, *William George Mores* took it absolutely; or whether it was to go to him for life only, and, upon his death, to the petitioners *Elizabeth* and *Selina*.

*Judgment.*

A suit was instituted by *William George Mores*, and a mortgagee of his interests under the will and codicils; and by a decree (f) he was declared to have been absolutely entitled to the leasehold estate in *Park-street*. It was, I think, also stated in the argument upon the present petition, that the Vice-Chancellor *Wigram* had, in this suit, also held him to have become absolutely entitled to one of the legacies of 600*l.* Consols; but this does not appear by the decree, as stated in the report of the case (g). If it was so held, I presume it was upon the hearing on further directions. The decision, however, whatever it may have been, will not relieve me from the necessity of determining the questions raised by this petition. I could regard it only as an authority; but it would, of course, carry with it the great weight to which all the decisions of the Vice-Chancellor *Wigram* are mostly justly entitled.

In order to arrive at a correct conclusion upon these questions, the case must, I think, be considered, first, upon

(a) 2 Ves. jun. 501.

(b) 8 Ves. 410.

(c) 4 Madd. 144.

(d) 1 Russ. & My. 553.

(e) 3 Russ. 365.

(f) See 6 Hare, 125.

(g) Id. 136.

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*Judgment.*

the terms in which the legacy is given to *Edward Rowe Mores*; and, secondly, upon the ulterior dispositions which are to be found in the codicil.

The legacy is given to *Edward Rowe Mores* in addition to what has been already given to him; and it is given subject to the same controlling powers, orders, restrictions, and directions of the trustees as are appointed by the will. Upon the argument of the case, it occurred to me that it might possibly be governed by what is said in *Crowder v. Clowes* (a) to have been determined by Lord *Thurlow*, referring probably to his decision in *Leacroft v. Maynard* (b), that added legacies shall be subject to the same conditions as apply to the legacies to which they are added; but, upon further considering the point, I am satisfied that that rule cannot be applied to the present case. It is clear from Sir *John Leach's* judgment, and from his decision in *Chatteris v. Young* (c), that he did not consider the rule to be universal. There are many cases in which it has not been applied; and I can find no case in which it has been held applicable, except where the original legacy has been absolute or defeasible in the party to whom the additional legacy has been given. To apply the rule in such a case as the present, would be to alter the terms of the disposition, and to convert what is in terms given to *Edward Rowe Mores* into a gift to him, and, after his death, to his sisters, the petitioners. The rule in question cannot, therefore, be applied in the present case; and I think that the provisions, which subject this legacy to the control of the trustees, mean no more than that they are to be vested with the same discretion, and to be subject to the same restrictions, as to the capital of the legacy, as they already had and were subject to as to the rents and interests given by the will. My opinion, therefore, is, that considering the case only upon the terms in which the

(a) 2 Ves. jun. 449.

(b) 1 Ves. jun. 279.

(c) 6 Madd. 30. See 2 Russ.

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legacy is given, *Edward Rowe Mores* was absolutely entitled to it.

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*In re*  
*Mores' Trust.*  
*Judgment.*

This being the construction of the gift itself, the remaining question is, whether the absolute interest thus given is cut down by the ulterior dispositions. This must depend, first, upon the construction to be given to the words "and to the survivor;" and secondly, upon the effect to be attributed to the words "in the event of both their deaths."

With reference to the words "and to the survivors," I think there is no doubt that they apply to this legacy as well as to the legacy given to *William George Mores*; for they are immediately prefaced and immediately followed by words which apply to both the legatees. The case, therefore, stands thus: the codicil gives 600*l.* Consols to *Edward Rowe Mores*, and 600*l.* Consols to *William George Mores* and to the survivor. It is evident the expression of the codicil is here defective. It is not stated in what event either legacy is given to the survivor. The meaning, I think, must be collected from the context. The succeeding clause provides, that, in the event of the death of both the legatees, both the legacies shall go to the sisters; and I think, therefore, this clause must mean, that, in the event of the death of either of the legatees, both the legacies shall go to the survivor; and thus reading the clause, (and to read it, that, upon the death of either, his legacy shall go to the survivor, would be to convert what is absolutely given into a mere life interest), I think there is no doubt of the construction. The survivorship would be to be referred to the period of distribution, and each legatee surviving the testator would take absolutely.

But then it is said, with reference to the effect to be attributed to the words "in the event of both their deaths,"

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*In re*  
*Mores' Trust.*

*Judgment.*

The provisions in the Wills Act against the lapse of legacies given to children, renders it necessary for a testator, intending that a legacy to one child shall go over to another in the event of the death of the first legatee, to express that meaning by his will.

that, although in ordinary cases such words would be held to refer to death in the lifetime of the testator, this testator has put his own construction upon them. That the words "in the event of the death of *Edward Rowe Mores*," as used by this testator in the first codicil, mean upon the death of *Edward Rowe Mores*; and that the words "in the event of both their deaths," as used in the second codicil, must have the same meaning. I agree that the words in question, as used in the first codicil, do mean upon the death of *Edward Rowe Mores*; but I do not think that this warrants the conclusion which is deduced from it, for the words used in the two codicils have reference to different subjects:—in the first codicil, to a mere life interest; and in the second, to a capital sum; and I do not think that the same words used with reference to different subjects must necessarily receive the same construction. It is to be observed, that, in consequence of the provision of the Wills Act against the lapse of legacies given to children, it was necessary for this testator, if he intended these legacies to go to his daughters in the event of the death of both his sons in his lifetime, to express that meaning by his will; and I do not know how he could have expressed it in any more appropriate words.

Upon the whole case my opinion is, that *Edward Rowe Mores* was absolutely entitled to this legacy, and that it belongs to his personal representative, and the order must be accordingly. The costs of all parties must be paid out of the fund.



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## COLE v. MILES.

July 8th.

THE testatrix, *Lucy Sutherland*, was the mortgagee of certain leasehold messuages and plots of land in *Market-street, Paddington*, with a power of sale, to secure 700*l.* and interest. By a third codicil to her will, dated in November, 1843, *Lucy Sutherland* bequeathed the mortgaged premises to *John Townsend*, for his own absolute use and benefit; and, by her will, she appointed *Cole, Martin, John Townsend*, and *Chevoux*, her executors. The testatrix died in January, 1844. *Martin* and *Townsend* proved the will in March, 1844, and *Cole* in November following. A suit (*Townsend v. Martin*) was instituted in December of the same year, by two of the residuary legatees against the executors; and by the Master's report, made in 1848, it was found, that, on the 30th September, 1845, *Townsend* was indebted to the estate of the testatrix to the amount of 2060*l.*; that *Townsend* was the solicitor of the Defendant *James Miles*; and that by an assignment, dated the 30th of September, 1845, *Townsend* assigned to *Miles* the leasehold premises in *Market-street*, "without ever having obtained any assent whatever on the part of *Cole* or *Martin*, his co-executors, to any of the bequests in his favour." That this deed recited the bequest of the premises to *Townsend* absolutely; the proof of the will by *Martin* and *Townsend* in March, 1844; and that the executors of the testatrix had assented to the bequest of the premises to *Townsend*; and that he had accepted the same, and entered into possession and receipt of the rents and profits thereof;

estate of the testatrix in a sum greater than the value of the property assigned. On a bill by the co-executors, on behalf of the estate of the testatrix, to set aside the assignment, and recover the title deeds, it was held, that the assignment by the executor to the purchaser was effectual, and that, whether there had or had not been an assent to the bequest by the other executors, the Court would not disturb the sale.

Whether, without any express assent by executors to a bequest of a leasehold estate, the entering of the legatee into possession and receipt of the rents and profits, with the knowledge of and without any objection from the executors, does not amount to an assent by them—*Quære*.

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that the mortgage debt, and an arrear of interest, was unpaid; and that *Miles* had contracted for the purchase of the premises at the sum of 499*l.*: and it was thereby witnessed, that *John Townsend*, "in his several capacities of executor and assignee of the said *Lucy Sutherland*," and in exercise of the power contained in the indenture of mortgage, in consideration of the said sum, did bargain, sell, assign, and transfer the said premises unto *Miles*, his executors, &c., for the residue of the term.

On the 30th of December, 1845, *Miles* assigned the premises to *Cundell*, and afterwards *Cundell* deposited the title deeds with *Wilson*.

By an order of the 5th of December, 1848, made in *Townsend v. Martin*, *John Townsend* was ordered, within two months, to pay into Court 212*l.* 5*s.*, then due from him to the estate of the testator. Under a reference made in the same cause on February, 1849, it was found that the Plaintiffs *Cole* and *Martin* had never assented to any of the bequests to *Townsend*; and that the assignment by *Townsend* to *Miles* was colourable, and without any good and valuable consideration; and that a bill should be filed by *Cole* and *Martin* against *Townsend*, *Miles*, *Cundell*, and *Wilson*, for recovery of the deeds and the possession of the premises, and for an account of the rents subsequent to the 30th of September, 1845. By an order of the 18th of July, 1851, in the cause of *Townsend v. Martin*, liberty was given to *Cole* and *Martin* to file the bill accordingly.

The bill, stating the foregoing circumstances, alleged also that the premises were sold by *John Townsend*, not in his character of executor or trustee, or for the purpose of satisfying claims due from the testatrix or her estate, but on his own account and for his own purposes; and it charged, that *Miles* had notice that there had been no as-

sent by the Plaintiffs to the bequest to *Townsend*, and that the affairs of the testatrix's estate were wholly unsettled, and that the suit of *Martin v. Townsend* had been registered as a *lis pendens*. *John Townsend* was out of the jurisdiction, and the subpoena was prayed against him when he should return. The bill prayed that the assignments of the 30th of September, 1845, and the 30th of December, 1845, might be declared to be fraudulent and void against the Plaintiffs; and that the deeds might be delivered up, and an account taken of the rents and profits received by the Defendants.

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*Miles*, by his answer, said that he was informed by *Townsend*, and believed, that the Plaintiffs *Cole* and *Martin* had assented to the bequest to *Townsend*, and that the recital of the fact on the deed was true. He admitted that *Townsend* was his solicitor. He submitted, that it was competent to *Townsend*, as such executor, to sell the premises, and that his receipt was an effectual discharge; that his assent alone was sufficient; and that an entry into the receipts of the rents and profits, on his own behalf, in the absence of any express assent by the Plaintiffs, would be sufficient evidence of such assent.

*Cole* and *Martin* were examined as witnesses. *Cole* stated, that they had given no assent to the bequest to *Townsend*. The evidence of *Martin* is stated in the judgment. The payment of the consideration to *Townsend* by *Miles* was proved by the Defendants.

Mr. *K. Parker* and Mr. *F. T. White*, for the Plaintiffs, cited *Morris v. Livie* (a), and contended that the statements on the deed with regard to the title and the assent of the executors, were sufficient to put a purchaser upon inquiry, whether the property which was the subject of the

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*Argument.*

assignment was not required for the payment of debts and legacies; and, if any inquiry had been made, the purchaser would have found that *Townsend*, the executor, was indebted to the estate, and therefore not in a position to claim the property for his own benefit: *Jones v. Smith* (a), *Taylor v. Hawkins* (b). They relied also on the fact, that the principle on which the suit was founded had received the sanction, and that the suit had been instituted under the direction, of the Court; and submitted that the fact of *Townsend* being the executor of *Miles*, moreover, gave the latter constructive notice of *Townsend's* situation in respect of the estate of the testatrix.

Mr. *Bacon* and Mr. *W. Morris* appeared for the Defendant *Miles*; Mr. *Russell* and Mr. *E. G. White* for the Defendant *Wilson*; and Mr. *Willcock* and Mr. *Prior* for the Defendant *Cundell*; but the arguments on behalf of the Defendants were stopped by the Court.

*Judgment.*

VICE-CHANCELLOR:—

There must, I think, have been some evidence before the Master upon the occasion of the inquiry made by him, which is not now before me; for I think that the Master would not, upon the evidence now before me, have come to a conclusion favourable to the institution of this suit.

There is no principle, as it appears to me, more important for this Court to observe, than that of abstaining from interference, on any other than substantial grounds, with sales made by executors. If this principle be disregarded, and if sales by executors of the property of their testators be permitted to be disturbed or questioned on slight grounds, it will be impossible to administer any estate except under the direction of this Court.

(a) 1 Hare, 43.

(b) 8 Ves. 209.

I am much disposed to think that this suit is altogether wrongly framed. Residuary legatees are, no doubt, entitled to follow the property of their testator in the hands of alienees, where the alienation has been made by fraud or collusion between the executors and alienees; but it is one thing for a residuary legatee to follow the property of his testator to the extent to which it has been improperly alienated; and another thing for the co-executors of an executor alleged to have committed a fraud, in which they have not concurred or acquiesced, to file a bill against such executor, to set aside a sale by him of property of the testator, and to have the title deeds delivered up to the co-executors. A case against an executor and alienee, such as that which is made by this bill, would, I think, to say the least, have been more properly brought forward by a supplemental bill in the original suit of *Townsend v. Martin*, filed by the Plaintiffs in that suit. I do not, however, intend to dispose of this suit on any question of form; and it is unnecessary therefore further to pursue this question.

The case made by this bill as the ground for setting aside the assignment to *Miles* of this portion of the estate of the testatrix, is, first, that there was fraud and collusion between the alienees of the estate and *Townsend*; and secondly, that, independently of the case of fraud and collusion, the assignment cannot be sustained. There is no evidence to establish the case of fraud or collusion; and the only question therefore is, whether I am to set aside the assignment, and decree the delivery up of the title deeds, on the ground of any facts which I can find on the face of the assignment, or in the situation of the parties with reference to the estate.

The deed recites the mortgage to the testatrix, and her will, by which she bequeaths to *Townsend* the property comprised in the mortgage; that the will was duly proved by *Martin* and *Townsend* on the 9th of March, 1844; that

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 }  
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 ———  
*Judgment.*

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the executors of the testatrix had assented to the bequest to *Townsend*; and that *Townsend* had accepted the same, and entered into possession of the premises, and the receipt of the rents and profits thereof. The deed then recites, that the 700*l.*, and an arrear of interest, was due on the mortgage; and that *Miles* had contracted for the purchase of the premises, at the sum of 499*l.*: and it witnesses, that, in consideration of the said sum, *Townsend*, in his several capacities of executor and assignee of *Lucy Sutherland*, and in exercise of the power contained in the mortgage deed, did, for the said consideration, sell and assign the premises to *Miles*. The deed, therefore, purports to be executed by *Townsend* in his character of executor as well as of assignee, by virtue of the bequest. Now, if I were to set aside this assignment, I must say that there was no sale to *Miles* by *Townsend* in his character of executor, for, if there were a sale by *Townsend* in that character, it is not even pretended that there is any ground which would warrant me in dealing with it as a sale which is not to be supported. The Court does not impose upon parties dealing with executors the duty of ascertaining whether the sale of property vested in the executor in that character is or is not proper. It is said, however, that I ought not to consider the sale as having been made by *Townsend* in his character of executor, inasmuch as the assignment goes on to state that the executors had assented to the gift, and that *Townsend* had entered into possession of the property. I am of opinion, however, that I cannot conclude from this recital, that the sale was not made by *Townsend* in his character of executor; for, although the assent to the legacy and the possession of the legatee no doubt creates another title, still it is a title which, standing alone, would be open to question upon the fact, whether there had been such an assent by the executors; and where the purchaser takes from the vendor in his character both of executor and legatee, I see no reason why the Court should strike out of the operative part of the

deed the statement that it is made in his character of executor. The form of the assignment may perhaps be accounted for by the fact that it is not an assignment of the mortgage debt, but of the irredeemable property. Upon the face of the assignment, therefore, I see nothing by which it can be impeached.

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 —  
*Judgment.*

It is said, however, that the purchaser had notice of facts which ought to have put him upon inquiry, and which, if he had inquired, would have led him to information that the assignment was not made by *Townsend* for the benefit of the estate, and that he had not acquired any title by the assent which was untruly alleged to have been given; but the deed recites that the testatrix appointed *Cole*, *Martin*, *Chevaux*, and *Townsend* her executors, and that *Martin* and *Townsend* only had proved the will, and that the executors had assented to the bequest; which must mean that those executors who had proved the will had so assented. Now, one of the executors, whose assent is thus alleged to have been given, is the party actually making the transfer by the deed; and *Martin*, the other executor who had proved, has been examined as a witness, and this is the evidence which he gives upon the point:—"I never either assented to or dissented from the bequest of the *Market-street* premises in favour of *John Townsend*. I understood that he, being of age at the time of the testatrix's death, was entitled to take what she left him without any control of his co-executors; and I left him to take possession of the interest in the *Market-street* premises bequeathed to him, and to deal with it as he pleased, without interfering with the matter at all either by way of assent or dissent." The testatrix, it appears, died in March, 1844; and the executors left *John Townsend* in exclusive possession of the property from that time until the sale in the month of September, 1845. He seems to have been all this time dealing with the property as his own; and I

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think it would be difficult to say, that there was not in fact an assent on the part of the executors; but, at all events, the case on this point is reduced to this—whether a purchaser from an executor and specific legatee of the subject of the specific bequest is bound to inquire whether the other executors have proved the will, or whether they have or have not given their assent. I think it is of great importance that no difficulty should be thrown in the way of the dealing by executors with the property of their testators, and that the purchaser in this case was not bound to make such inquiries. With respect to the purchaser having notice of the original suit, I intimated during the argument, and I continue of that opinion, that it was not material, as the original suit did not relate to the property specifically bequeathed. The bill must be dismissed with costs, to be paid by the Plaintiffs; but the Plaintiffs, having acted under the order of the Court, will repay themselves the costs out of the estate of the testatrix.

July 23<sup>rd</sup>.

COLE v. MUDDLE.

A testatrix bequeathed a leasehold estate to trustees and executors, in trust for sale, and gave one of such executors a beneficial interest for his life in one-fourth part of the estate. The latter executor, being at the

time indebted to the estate of the testatrix, made an assignment of his beneficial interest by way of mortgage, to secure a private debt which he owed to a creditor, and deposited the title-deeds with the creditor:—*Held*, on a bill by his co-executors, to recover the title-deeds, that the estate of the testatrix was entitled to a lien on the interest of the defaulting executor in the premises comprised in the deeds, in priority to the lien created by his assignment to the mortgagee; and the Court decreed the title-deeds to be delivered up, with a declaration that they belonged to the three trustees.

THE testatrix, *Lucy Sutherland*, by her will bequeathed certain leasehold houses in *Chelsea* and in *Park-place* to the executors of her will, in trust for sale; and one-fourth part of the said property, and of the proceeds of the sale thereof, she bequeathed to *John Townsend* for life, with remainder to his children. *Townsend*, with *Cole*, *Martin*, and *Chevauz*, were named executors; and the will was proved by *Townsend*, *Cole*, and *Martin*.



A suit (*Townsend v. Martin*) was instituted by some of the residuary legatees against the executors; and in the progress of the suit it was referred to the Master, to ascertain in whose possession the title deeds of the several estates belonging to the testatrix at the time of her decease then were, and to consider whether any and what proceedings should be taken to recover them. By another order in the same cause, made on the petition of *John Muddle*, the Master was directed to inquire whether *Muddle* had any and what mortgage, assignment, or other incumbrance upon the one-fourth part or share of the ground rents on the houses in *Chelsea*, the house in *Park-place*, and in the residuary estate of the testatrix specifically bequeathed by her in trust for the defendant *Townsend*. The Master reported that there was due from *Townsend*, as one of the trustees and executors of the testatrix, a balance of 2060*l.* 10*s.* 1*d.*; and that *Cole* and *Martin*, the other executors who proved the will, had never assented to the bequests for the benefit of *Townsend* contained in the will; and that *Townsend*, being so indebted to the estate of the testatrix, by a deed, dated in August, 1847, assigned to *Arden* the part or share of the said messuages to which he was entitled for his life under the will of *Lucy Sutherland*, by way of mortgage, for securing the sum of 250*l.* owing by *Townsend* to *Arden*, and a further advance of 50*l.* then made to him by the latter, and the interest on the said sums; and *Townsend* then or previously delivered over to *Arden* the title deeds of the premises comprised in the mortgage, and belonging to the estate of the testatrix; that *Arden* had notice of the administration suit when he took his security; and that it was afterwards, in December, 1847, registered as a *lis pendens*; that in March, 1848, *Arden* transferred the mortgage to *Muddle*, and delivered over to him the title deeds. The Master upon these facts found that *Muddle* had not any mortgage, assignment, or other incumbrance upon the one-fourth part or other the

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share of the *Chelsea* rents, or in the residuary estate of the testatrix specifically bequeathed in trust for *Townsend*, or of the said house in *Park-place*; and he was of opinion and found, that a bill should be filed by or in the name of the Plaintiffs against *Townsend* and *Muddle* for recovery of the title deeds.

The report was confirmed, and the present suit was accordingly instituted under the direction of the Court; and it prayed, that the assignment of August, 1847, might be postponed to any claim which might be due from *Townsend* to the estate of the testatrix; and that the title deeds might be delivered up.

*Muddle*, by his answer, submitted, that no assent by the Plaintiffs was necessary to the title of *Townsend* to his legacy, inasmuch as *Townsend* was one of the executors of the will. However, he submitted that the Plaintiffs did assent to the bequests by the will to *Townsend*; for it appeared by the proceedings in the administration suit, that, after the institution thereof, and notwithstanding the bill prayed an injunction and receiver against *Townsend*, no attempt was made by the Plaintiffs, his co-executors, who were parties to the suit, or by any other party thereto, to prevent *Townsend* from receiving and getting in the personal estate of the testatrix; and accordingly, as it appeared by the proceedings, *Townsend* did, after the institution of the suit, receive on account of the personal estate of the testatrix various sums of money approaching, or equal in amount, to the sum stated to be due by the Defendant *Townsend* on account thereof. The Defendant also said, that, at the time of the date and execution of the assignment to him in March, 1848, he had no knowledge or notice, nor any reason to know or suspect, that a large or any balance was in the hands of *Townsend* on account of the testatrix's personal estate; and he submitted,

that the Plaintiffs were not entitled to recover from him the title deeds so delivered over to him by *Arden*, without paying the Defendant the said principal money and interest; or, if the Court should be of opinion that the Plaintiffs were so entitled, then the Defendant insisted that he was entitled to be reimbursed such principal money and interest by *Arden*; and he submitted, that *Arden* was a necessary party to the suit.

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Mr. *Kenyon Parker* and Mr. *F. T. White*, for the Plaintiffs, relied on the notice to *Arden* of the suit of *Townsend v. Martin*, and of the fact that *John Townsend* was a debtor to the estate of the testatrix for the balance found to be due from him in that suit. And on this point, in addition to the cases cited in *Cole v. Miles* (a), they cited *Jennings v. Bond* (b) and *Drew v. Earl of Norbury* (c). They contended, that *John Townsend* could not, by his assignment, pass more than his equitable interest in the property, which was subject to the claims of the estate against him; and that therefore the Defendant could only retain the interest of *John Townsend* in the property in question, on redeeming it by the payment of the sum found to be due from him to the estate. The additional cases cited on this point, not referred to in the preceding case, were *Forbes v. Peacock* (d) and *Priddy v. Rose* (e).

Argument.

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Mr. *C. P. Cooper*, Mr. *Scott*, and Mr. *J. S. Moore*, for the Defendant *Muddle*, relied on the case set up by his answer.

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(a) *Supra*, pp. 181-2.

(b) 2 J. & L. 720.

(c) 3 J. & L. 267.

(d) 1 Ph. 717.

(e) 3 Mer. 86.

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 Judgment.

VICE-CHANCELLOR, (after stating the facts of the case):—

At the date of the mortgage by *John Townsend* of his interest in this part of the estate of the testatrix to *Arden*, *Arden* had notice of the will under which *John Townsend* claimed; and by which will it appeared that the property in question was not bequeathed to *Townsend* absolutely, but to him jointly with others as executors and trustees; that *Townsend* took a beneficial interest in one-fourth part only, and that other legatees were beneficially interested in the other three-fourths of the property. This bill is filed by the other executors and trustees to have the title deeds given up by a mortgagee, who holds them under an assignment and delivery by *Townsend*, himself an executor and trustee, and also beneficially interested for life in one-fourth of the property. I will first consider the case as if it was a bill filed by the Plaintiffs against *Townsend* for the delivery of the title deeds, putting the mortgage out of the case. Could then *Townsend* hold the deeds against his co-executors and co-trustees? Could he hold possession of the estate. If he claimed to do so, the answer to his claim would be "We are executors equally with yourself, we have never conveyed the property to you. You are a debtor to the estate." Surely it is clear, that, on a bill filed by the Plaintiffs against *Townsend*, stating such a case, a receiver would be appointed. The Plaintiffs in their character of joint trustees had a lien on the property vested in them jointly with *Townsend*; and if *Townsend* could not, as it appears to me he clearly could not, retain possession of the estate, it must, I think, be at least equally clear that he could not retain possession of the title deeds (a). Is then the Defendant *Muddle*, claiming under *Townsend*, in any better position as against the Plaintiffs, *Muddle* having taken with notice of the will? I think that he is not. The case of *Priddy v. Rose* (b) has

(a) See *Peake v. Ledger*, 8 Hare, 313.

(b) 3 Mer. 86.

decided that the equity of the estate to which the alienor is indebted will prevail over the equity of the alienee. Some of the cases upon this subject have indeed gone to a much greater length; but, at all events, I think that I shall not be going beyond what the authorities warrant, in holding that the lien of the co-executors on this part of the estate must prevail over *Muddle's* interest, which is created by the mortgage of *Townsend*.

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 V.  
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 —  
*Judgment.*

It was argued, that *Townsend* executed the mortgage in his character of executor, and that one executor may deal with leaseholds; and so no doubt he may: but this mortgage was not made by *Townsend* in his character of executor. Reliance was also attempted to be placed on the assent of *Townsend*; but this assent could in no event, as I apprehend, go further than to vest the estate in the trustees. The case in that respect is wholly different from the preceding one. It is to be observed also, that this security was for the most part given for an antecedent debt, as appears by the mortgage deed itself; and I take the general rule in such cases to be, that the equity of the estate prevails over a charge created to satisfy the private debt of the executor. Upon these grounds I think that the deeds must in this case be brought into Court, with a declaration that they belong to all the three trustees, and that the estate of the testator has a lien on the interest of *Townsend* in the premises comprised in the deed, in priority to the Defendant *Muddle*, for securing the amount due by *Townsend* to the estate of the testatrix. The decree will be with costs against *Muddle*.

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Nov. 16th,  
17th, & 20th.

1853.

Jan. 8th.

A creditor, at the date of a deed of inspectorship and trust, made by a debtor for the benefit of his creditors, had a claim against the debtor for an ascertained sum of 197*4*l, and an unascertained sum on account of acceptances which he had given to the debtor on goods shipped by the debtor through the creditor as his factor, on a del credere commission, and which had not then been sold, of which acceptances 5000*l* had then become due; and the creditor, in this state of things, executed the deed generally, without specifying on the deed the amount of his debt or claim. Upon the ultimate account after the goods were sold, it appeared that a balance of 5348*l* was due to the creditor from the debtor:—*Held*, that the creditor was entitled to a dividend from the debtor's estate for the sum of 5348*l*, and not merely for the sum of 197*4*l.

## GRAHAM v. ACKROYD.

**A** BILL, filed by Messrs. *Graham, Maclean, & Co.*, merchants at *Liverpool*, against the inspectors under a deed of inspectorship and trust for creditors, executed by *Edward Rawson*, and dated the 11th of February, 1846, and against *Rawson* and three other persons, who, as well as the inspectors, were creditors and parties to the deed; and the bill prayed that the trusts of the deed of inspectorship might be performed under the decree of the Court, and an account taken of the assets of *Rawson* come to the hands of the trustees; and that the Plaintiffs might be put on an equal footing with respect to their debt of 5348*l* with the other creditors, and receive the dividends thereon equally with such creditors.

The Defendant *Rawson* formerly carried on business at *Halifax*, in *Yorkshire*. The Plaintiffs, *Graham, Maclean, & Co.*, were merchants at *Liverpool*, and had foreign houses of trade at *Lima* and *Valparaiso*. For some years previous to 1842, the Defendant *Rawson* consigned goods to one of the Plaintiffs' foreign houses, through the medium of the Plaintiffs' house at *Liverpool*, paying the *Liverpool* house a del credere commission; and up to 1842, the agreement between the Plaintiffs and *Rawson* was, that the Plaintiffs should be under no cash advance, but that they

Under an agreement between a shipper of goods and a factor, through whom the goods were sold in a foreign country, the factor gave his acceptances to the shipper for a proportionate part of the value of the goods, for the payment of which acceptances, if not satisfied by the proceeds of the goods, the shipper was to provide:—*Held*, that, on his failure to do so, and on the payment of the acceptances by the factor, the shipper of the goods became debtor in account to the factor for the amount paid by the latter; and that the remedy of the factor was not merely in damages.

Where a factor makes advances he has a personal remedy against the principal as well as a lien on the fund; and this is the same whether the factor has or has not a del credere commission, except that, when the factor, having a del credere commission, has sold the goods, he cannot sue the principal for advances which are covered by the price of the goods, that price being warranted to the principal by the guarantee arising out of the commission.

were to make advances to *Rawson* to the extent of three-fourths of the invoice value of the goods consigned. The course of business was, that *Rawson* drew upon the Plaintiffs for the above proportion of the invoice value, and the Plaintiffs accepted the bills and returned them to *Rawson*, by whom they were discounted; and when the bills fell due, if the Plaintiffs were not in funds by remittances from the foreign house, other bills were drawn, accepted, returned, and discounted in like manner, and the proceeds remitted to the Plaintiffs to meet the bills falling due. In 1842, the Plaintiffs desired *Rawson* to make consignments to the other of their foreign houses also; and they agreed that if he would do so, they would come to some extent under cash advances. *Rawson* accordingly, from this time up to about the end of 1845, made consignments to both the Plaintiffs' foreign houses, through the *Liverpool* house, and the Plaintiffs came under some cash advances; but their advances to *Rawson* still continued to a great extent to be made by bills in the manner above described. At the end of 1845, the Plaintiffs were creditors of *Rawson* to the amount of 15,000*l.*; but of this balance, 12,000*l.* consisted of running bills, which, to the extent of 5000*l.*, were due early in January, 1846, but, as to the remaining 7000*l.*, were not due till March, 1846. *Rawson* fell into difficulties about the end of 1845, in consequence of which he executed the deed of inspectorship and trust of the 11th of February, 1846. That deed was made between *Rawson*, of the first part, *Ackroyd* and six others, the inspectors, of the second part, and the several other persons executing the same, being respectively creditors of *Rawson*, of the third part; and after reciting that *Rawson* was indebted to the several persons parties thereto of the second and third parts in the several sums of money in the schedule thereunder written or set opposite to their respective names; and that, in regard that there were large sums of money due to *Rawson* from persons residing

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abroad, and of divers adventures outstanding, and of heavy losses, he was unable to proceed in carrying on his trade and to satisfy his said creditors their debts, he had therefore proposed to act in such manner as they should think most conducive to the getting in of his estate and distributing the same among his creditors; and in consideration of the covenants by *Rawson*, the parties of the second and third parts granted and agreed with *Rawson* not to arrest or impede him; and *Rawson* covenanted to deposit all securities, &c. with the inspectors, and comply with their directions as to the getting in and disposing of his estate and effects, and the payment of the monies received into the Bank to the account of the inspectors; and it was thereby agreed that the said monies should be distributed, after payment of the costs and expenses of the inspectors, unto and among the several parties thereto of the second and third parts respectively, and their respective executors, &c., rateably and proportionably according to the amount of their said respective debts, until the whole of such debts, or so much as the same monies should extend to pay, should be liquidated; such distribution to be made from time to time as often as the sum in hand should be sufficient to pay a dividend of 2s. in the pound, or sooner, at the desire of the creditors, as therein mentioned. And it was declared, that, in case any dividend should be made under the deed before all the creditors of *Rawson*, whose debts respectively should exceed the sum of 15*l.* each, should have executed it or a duplicate thereof, or have otherwise acceded thereto, the inspectors should be at liberty to retain the rateable dividend of all or any such creditor or creditors as should not have so executed or acceded, and pay the same to such creditor or creditors on his or their executing the deed or acceding thereto; or in case no such retention should be made by the inspectors, they should be at liberty, out of the first money which should afterwards come to hand, arising from the said estate and effects, to



pay to such of the said creditors as should afterwards so execute or accede, a rateable dividend or dividends on the amount of the debt or debts of such creditor or creditors, before any further dividend should be made among the other creditors; and it was declared to be lawful for the inspectors to authorise and direct *Rawson* to compromise or compound any debt or debts due and owing to him, and to give time for payment to all or any of the persons indebted to him, or to whom goods and effects had been consigned by him for sale abroad, until the proceeds of such sales had been received by or on account of the consignees, and generally to authorise and direct *Rawson* to act with respect to consignments of goods for sale, as well those then already consigned as those which under the deed might thereafter be consigned. The deed gave various other powers to the inspectors, and contained other covenants by *Rawson*; and it was declared, that, if *Rawson* should make default in performing all or any of his said covenants, or if all the creditors, whose debts respectively amounted to upwards of 50*l*., except only those whose debts individually did not exceed 15*l*. each, and also except creditors who were possessed of or entitled to any other securities for their debts and should choose to rely thereon, should not duly execute the deed or a duplicate thereof, or otherwise accede or agree to the terms thereof within the space of four months next after the day of the date thereof, then and in every of the said cases the license and liberty thereby given to *Rawson*, and every other article, matter, and thing therein contained, so far as the same tended to restrain the said respective parties thereto of the second and third parts, or any of them, or their respective heirs, executors, or administrators, or partners, from suing for and recovering their several demands within the time aforesaid, should cease, determine, and be absolutely void, any thing thereinbefore contained to the contrary notwithstanding, but subject

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and without prejudice to all payments and acts which should have been made or performed by the inspectors under or by virtue of the deed.

At the time of the execution of this deed, the Plaintiffs had a claim against *Rawson* for 1974*l.*, in respect of some bills which were not connected with the goods account; and on the 5th of June, 1846, they wrote to the solicitors employed by the inspectors as follows:—"We address you on the subject of a claim we have against him [*Rawson*] for the value of three bills, amounting to 1974*l.*, which he ought to have accounted to us for, as per his letter of 9th December last, of which you have no doubt a copy. This claim is altogether independent of what he may be owing on his general account, which we cannot well make an approximate of till his goods are nearly all sold." And to this letter the inspectors' solicitors replied:—"We have laid your letters to us on the subject of your claim on this estate, in respect of the bills of 1974*l.*, before the inspectors; and we are desired to say, they trust you will not press that claim until your account approaches nearer to a final balance. A sufficient sum will be reserved to meet a dividend on these and all other unadmitted bills, to be paid on the amount (if any) to be ultimately found due, which will (we hope) be deemed satisfactory to you." The Plaintiffs answered this letter on the 13th of August, by stating that the reply of the inspectors' solicitors was by no means satisfactory to them, observing, "We consider our claim to rank and receive a dividend at once on Mr. *Rawson's* estate for 1974*l.* to be perfectly valid, and will not defer it. We will, therefore, thank you to let us know, at your earliest convenience, if the inspectors will admit our claim or not; for if they determine on the latter course, we shall be under the necessity of adopting other measures to protect our interest." To this letter the inspectors' solicitors replied on the 15th

of September, 1846, to the effect that the inspectors admitted the Plaintiffs' claim, and that they would transmit the deed to *Liverpool* in a day or two, to be signed by them in respect of the bills in question, after which a cheque should be sent for the amount of their dividend.

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On the 23rd of October, 1846, the deed was sent to *Liverpool*, for the purpose of being executed by the Plaintiffs, as it is alleged by the Defendants, in respect of the 1974*l.* only. The Plaintiffs executed the deed generally, and without reference to any particular amount being due to them; nor is the amount of their debt noticed in their execution of the deed, or entered in the schedule; and the conduct of the Plaintiffs in thus executing the deed is impeached by the answers of the Defendants. The Plaintiffs, however, immediately after executing the deed, wrote to the inspectors' solicitors as follows:—"We have signed this inspection deed without the amount of our debt being stated; for, besides the claim admitted, amounting to 1974*l.* 12*s.* 9*d.*, we shall have a further claim on the general balance of accounts, so soon as these accounts can be closed. We cannot state the amount, but we believe it is likely to be at least 2500*l.* In the meantime you can send us the dividend on the debt ascertained, and of course a sufficient reserve will be made in respect of our further claims."

In November, 1846, the inspectors paid a dividend of 1*s.* in the pound; and afterwards, in July, 1847, they paid a further dividend of 6*d.* in the pound, under the deed; and those dividends were paid to the Plaintiffs in respect of the 1974*l.*; but no payment of either of the dividends was made to the Plaintiffs in respect of the balance claimed to be due on the goods account. That balance was gradually reduced by the remittances from the foreign houses of the proceeds of the goods which had been sold; and the Plain-

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tiffs rendered half yearly accounts to the inspectors, in which they credited themselves with these proceeds against the debt remaining unpaid. These accounts came down to 1849, when, all the goods having been sold, the ultimate balance stood at 5348*l.*, in favour of the Plaintiffs, upon which they claimed to be paid the dividends of 1*s.* and 6*d.* in the pound.

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Argument.

Mr. *Rolt*, Mr. *Follett*, and Mr. *Kinglake*, for the Plaintiffs.

Mr. *Elmsley* and Mr. *Rogers* for the Defendants.

The principal question was on the actual existence of a debt to the Plaintiffs at the time of the execution of the deed in respect of the unascertained balance which might appear after the sale of the goods and the application of the proceeds against the advances the Plaintiffs had made, and against those for which they were still liable under their acceptances. On the existence of a debt to the factor from the principal at the time when the factor had under his control goods of the principal which might be of a value, and might sell for an amount, greater than his advances to the principal, the case of *Foley v. Hill* (a) was referred to, in which Lord *Cottenham* laid down "that the goods remain the goods of the owner or principal until the sale takes place" (b), shewing, therefore, that until then they formed no set off to reduce the amount of the debt created by the advances of the factor to the principal.

On the effect of acceptances having been given or advances made by a factor to his principal on goods with regard to which he has a del credere commission, and the selling price of which he is therefore bound to guarantee,

(a) 2 H. L. Cas. 28.

(b) *Id.* 35.

as excluding the factor from the character of a creditor before the sale—*Story* on Agency, s. 215; *Russell* on Factors, 262, were cited on behalf of the Defendant. On the argument that the debt not being in existence or actually contracted at the date of the deed, the Plaintiffs were not entitled to payment out of the trust estate: *Purefoy v. Purefoy* (a). On the definition of the term "debt," Sir John Leach's judgment in *Wathen v. Smith* (b), and the case of *Collins v. Crouch* (c) were mentioned. On the extent of the power vested in the inspectors to admit or reject debts: *Wain v. Earl of Egmont* (d).

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 Argument.

VIC-CHANCELLOR:—

In determining the question, whether the Plaintiffs can maintain their claim to be paid the dividends in respect of the balance of 5348*l.*, no weight can, I think, be given to the allegations contained in the answers of the Defendants, and in the evidence on their part as to the Plaintiffs having unduly executed the deed without having limited their execution to the 1974*l.* The Plaintiffs have, in fact, executed the deed without such limit; and it is, as I apprehend, the duty of the Court to give them all the rights which are incident to such an execution, so long as those rights are not extinguished or reduced by judicial decision; and there are here no proceedings on the part of the Defendants to extinguish or reduce them. The Defendants, if they meant to rely upon this part of their case, ought, I think, to have filed a cross bill to set it up. No decree can, in my opinion, be made in their favour in this suit in respect of such a matter as this. It is not, I think, different from the ordinary case of a defendant at-

Judgment.  
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(a) 1 Vern. 28.  
 (b) 4 Madd. 331.

(c) 13 Q. B. 542.  
 (d) 3 My. & K. 445.

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tempting to impeach by answer and by evidence a deed which is sought to be enforced.

The true question, therefore, is—what are the rights which the Plaintiffs have acquired by the execution of this deed without any specification of the amount claimed to be due to them? It is, in the first place, said, on the part of the Defendants, that this deed provides only for debts the amount of which was at the time ascertained; and that the debt (if any) due to the Plaintiffs on the goods account was at the time unascertained; and that the Plaintiffs therefore could be entitled to no dividend in respect of that debt. But upon examining the provisions of the deed, I think that this point cannot be maintained. The general scope and object of the deed was the winding up of the affairs of *Rawson* by the application of his then present estate and effects to the payment of his debts, and releasing him and his future estate from further liability upon such application being made; and it is obvious that this purpose could not be carried into effect if such debts only as were at the time ascertained in amount were to be included in the provisions of the deed. It is clear, too, upon the face of the deed, that the parties to it knew that there were outstanding adventures.—[His Honour read the recital as to outstanding debts and the power to compromise accounts, stated *supra*, p. 195.]—Having known that there were outstanding adventures, the parties must of course be taken to have known that it was uncertain whether those adventures would result in credit or in debt; any construction therefore which would limit this deed in its provisions to debts which were at the time ascertained would be contrary to the general scope and object of the deed. I think also it would go far to contravene its express provisions; for if creditors whose debts were unascertained were not to come in under the deed, what

reasonable security could there be to *Rawson* for the weekly payments reserved to him, and the furniture which he was to be permitted to retain? It is true there is a recital in the deed that *Rawson* is indebted to the parties thereto "in the several sums in the schedule" thereunder "written or set opposite to their respective names;" and this recital no doubt shews that it was intended that the amounts of the debts should be specified in the schedule. But the question is, not whether the debts were intended to be specified in the schedule, but whether the provisions of the deed were intended to extend only to debts the amount of which was so specified; and I think that they were not. The next recital in the deed of the proposal of *Rawson* to satisfy his creditors their respective debts, and the covenants of the creditors not to sue or molest him, tend to exclude any such restriction. Could it be contended that a creditor who had executed the deed and whose debt was not ascertained could sue notwithstanding this covenant? [His Honour adverted to several other covenants and provisions in the deed in which creditors and debts were referred to without any restrictive words.] All these provisions satisfy my mind that what was looked to in this deed was the creditors becoming parties to the deed, and not the amount of their debts being ascertained. My opinion therefore is, that these Plaintiffs are not the less entitled to the dividend on the balance due on the goods account, because the amount which would be ultimately due on that account was not ascertained. It was asked, how upon this construction could any dividend be made? The answer I think is, that a reserve would be made for the claim.

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It was said, however, for the Defendants, that in truth there could be no debt due to the Plaintiffs from *Rawson* on the goods account until all the goods were sold, and this position was rested upon two grounds:—First, that

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upon *Rawson's* not providing for the acceptances given by the Plaintiffs for the goods, the remedy of the Plaintiffs was in damages. And secondly, that a factor taking a del credere commission has not, in respect of advances made by him, any personal right against his principal until the goods in respect of which the advances have been made are sold, and it is ascertained that the goods are insufficient to meet the advances. But with respect to the first of these points, I think that when the Plaintiffs paid the acceptances, which it was *Rawson's* duty to provide for, he became debtor to the Plaintiffs for the amount which they paid on his account. And with respect to the second point, I am aware of no authority for such a position. The passages cited from *Story* and *Russell* do not seem to me at all to bear it out: those passages, as I understand them, mean no more than this, that, where a factor, having a del credere commission, has made advances and has sold the goods, he cannot, whether he has received the proceeds of the sale or not, sue the principal for so much of the advances as is covered by the price of the goods; because, by the guarantee arising out of the commission, he has warranted that price to the principal. The general rule of law appears to be, that, where a factor makes advances, he has a personal remedy against the principal as well as a lien on the fund; and, except in the case to which I have referred, I do not see how the right can differ, owing to the circumstance of the factor having or not having a del credere commission. No doubt the factor's remedy against the principal may be waived by express or implied agreement; but there is here no such express agreement, and I see nothing in the facts of the case from which such an agreement can be implied.

My opinion, therefore, is, that the Plaintiffs were creditors of *Rawson* for the advances, notwithstanding they had not sold the goods. And it appearing that there were



bills to the amount of 5,000*l.* which accrued due early in January, 1846, it follows that there was, at the date of the deed, due to the Plaintiffs the full amount which is now claimed to be due to them upon the ultimate balance of the account.

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It remains, then, only to consider, whether the provisions of the deed exclude the Plaintiffs from the right to the dividends of one shilling and of sixpence upon this ultimate balance. And I am of opinion that they do not; for both these dividends were declared after the Plaintiffs had executed the deed; and I have already decided, that the execution of the deed cannot be limited to the 1874*l.*

Some reliance was placed by the Defendants in their argument, upon the circumstance of the clause in the deed, which has reference to dividends declared before all the creditors shall have executed, being in terms expressed merely to give liberty to the inspectors to pay the dividends to the creditors who should afterwards execute it. But the Plaintiffs having come in before those dividends were declared, I think that clause does not affect the present case. Besides, that clause, as I apprehend, means no more than to preserve a discretion in the inspectors against the absolute trust created by the prior part of the deed.

The Defendants also place some reliance on the circumstance of the deed not having been executed by the Plaintiffs till after the expiration of the four months limited for its execution by the creditors. But the deed has been so acted upon that I cannot entertain any objection founded on this point.

As to the costs of the suit I have felt some hesitation;

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but, in the result, my opinion is, that they ought to be paid out of the fund in hand. I think there was some reasonable question upon the deed, and that the inspectors were justified in taking the opinion of the Court upon it. The Plaintiffs, I think, have almost admitted this by making other creditors parties to the suit. The proceeding by claim would, to say the least, have been open to great difficulty; and, although I am not altogether satisfied with the conduct pursued on the part of the Defendants before the suit was instituted, I see no reason for attributing any blame to them for their proceedings in the conduct of the suit.

### RUSSELL v. JACKSON.

*March  
 6th & 9th.*

A devise and bequest of the testator's residuary estate to two persons, with an oral intimation given by the testator to one (if not both) of the devisees, that he had confidence in them, and was satisfied

they would carry out his intentions, which they well knew, and an assent by one of the devisees to this intimation:—*Held* to be an undertaking by the devisee that he would carry out the intimation, and to be therefore a gift upon a secret trust. And it appearing that the trust was for the foundation of a Socialist school, and either charitable or illegal, the Court declared it void as to the real estate, mortgages, and chattels real, and directed an inquiry into the nature of the trust contemplated.

Where it appeared that the gift was made upon the assent and consequent undertaking of one only of the devisees in trust to perform the illegal or void trust, the other devisee could not take the estate beneficially.

In such a case, if the extent of the property intended by the testator to be subjected to the secret trust be uncertain, it lies with the trustee who has taken the estate by means of his assent to the testator's design, to shew to what part of the property the trust does not extend.

The facts of the case, and the evidence on which the Court proceeded, appear fully in the judgment (a).

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(a) The will was as follows:—

"I, *Joseph Russell*, of &c., do make and publish this my last will and testament in manner following, that is to say—First, I direct that all my just debts, funeral and testamentary charges and expenses, be fully paid and satisfied by the executors hereinafter named. I give, devise, and bequeath all my freehold messuages, land, and hereditaments, situate at *Shirley-street* aforesaid, unto my brother *William Russell*, to hold to my said brother for the term of his natural life; and from and after his decease, I give, devise, and bequeath the same to *William Jackson* and *Thomas Aston Jackson*, their heirs and assigns for ever. I also give, devise, and bequeath unto the said *William Jackson* and *Thomas Aston Jackson* all the rest and residue of my freehold and leasehold property, stock-in-trade, household furniture, and effects, whatsoever and wheresoever, and of whatsoever nature or kind, of which I may die possessed: To hold the same unto the said *William Jackson* and *Thomas Aston Jackson*, their heirs, executors, administrators, and assigns, upon and for the trusts, intents, and purposes hereinafter mentioned and declared respecting the same; (that is to say), upon trust that they the said *William Jackson* and *Thomas Aston Jackson*, or the survivor of

them, his executors or administrators, do and shall, as soon as conveniently may be after my decease, collect and get in my debts, and sell and dispose of all my freehold (except the *Shirley-street* property hereinbefore disposed of) and leasehold property, stock-in-trade, household goods and other effects, either by public auction or private contract [their receipts to be discharges]. And I do hereby further will and direct, that the said *William Jackson* and *Thomas Aston Jackson* shall receive the money to arise from such sale and collection, and stand and be possessed thereof in trust to pay and discharge the legacies hereinafter by me given and bequeathed (that is to say) [here followed some legacies to persons named]. I direct the before-mentioned legacies to be paid to the respective legatees within six months after my decease. And as to all the rest and residue of the monies to arise from the before directed sale and collection, I give and bequeath the same unto the said *William Jackson* and *Thomas Aston Jackson* as a testimony of my regard and esteem for them, and as a compensation for the trouble they will have in the execution of this my will; and I appoint the said *William Jackson* and *Thomas Aston Jackson* executors of this my will and testament."

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*Argument.*

Mr. *Speed*, for the Plaintiffs, submitted, first, that upon the evidence in the cause it was clear that there had been an express or a tacit undertaking on the part of the devisee and executors to perform the directions of the testator as to founding a school, and that this created a trust, upon which the Court would act, and prevent the devisee and executors from holding the estate discharged of the trust: *Thynn v. Thynn* (a), *Reech v. Kennigate* (b), *Barrow v. Greenough* (c), *Oldham v. Litchford* (d), *Podmore v. Gunning* (e), *Walker v. Walker*, per Lord Hardwicke (f), *Muckleston v. Brown*, per Lord Eldon (g). There being evidence of a trust, the question is, whether the trust is void wholly or to any extent; for to the extent to which it is void as to the personal estate, the next of kin are entitled: *West v. Shuttleworth* (h), *Boson v. Statham* (i), *Edwards v. Pike* (k); and the disposition is void against all parties, and not only against those by whose act it has been obtained: *Huguenin v. Baseley* (l). The trust in this case is shewn to be for purposes inimical to the Christian religion, and therefore void. A gift in aid of contributions "towards the political restoration of the Jews to Jerusalem and to their own land" has been held void: *Heber-shon v. Vardon* (m).

Mr. *Walker* and Mr. *Kirkman* for the heir-at-law of the testator.

Sir *W. P. Wood* and Mr. *W. M. James* for the Attorney-General.

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| (a) 1 Vern. 296.                   | (g) 6 Ves. 69.  |
| (b) Amb. 67.                       | (h) 2 My. & K. 684.                                       |
| (c) 3 Ves. 152.                    | (i) 1 Eden, 508.  |
| (d) 2 Vern. 508.                   | (k) Id. 267.  |
| (e) 7 Sim. 644; S. C., 5 Sim. 485. | (l) 14 Ves. 289.  |
| (f) 2 Atk. 99.                     | (m) Before Sir James Knight Bruce, V. C., 30th May, 1851. |

Mr. *Rolt* and Mr. *F. T. White* for the Defendants, the *Jacksons*, contended that there was nothing to affect them with any trust: *Burney v. Macdonald* (a). They submitted, that there was a total absence of proof either as to what the purpose was which it was suggested the testator had in his mind, or that he continued to entertain the intention when the difficulties in effecting it had been pointed out to him, or even as to what portion of his property he had at any time intended to dedicate to the suggested purpose; and they contended that it was contrary to the principles of the Court to declare the existence of a trust entirely uncertain as to subject or object. If, however, there were to any extent a trust, there was no reason why it should not be carried into effect, so far as it was lawful; and the trust gave the next of kin no right to sue. The affairs of a Company for establishing a school on the principles of *Robert Owen* had been the subject of a suit in this Court, without any objection as to its legality: *Jones v. Morgan* (b).

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 —  
 Argument.

VICE-CHANCELLOR:

This is a bill filed by *Samuel Russell* as one of the next of kin of the testator *Joseph Russell*, suggesting that *Joseph Russell* has disposed of the residue of his real and personal estate to the Defendants, *William Jackson* and *Thomas Aston Jackson*, upon a secret trust, either for charitable or for illegal purposes; and the bill seeks to have it declared that the residuary devise in the will to these Defendants was made to them upon a secret trust, to establish schools for promoting doctrines of Socialism, as taught by Mr. *Robert Owen*; and that the said Defendants are trustees of the residue for the heir-at-law and

Judgment.  
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(a) 15 Sim. 6.

the Vice-Chancellor of *England*.

(b) 14th January, 1846, before (See 10 Jur. 238).

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next of kin, or representatives of the next of kin of the testator.

The first question which arises is, was there or was there not a gift by this testator to these Defendants, upon a trust, either for charitable or for illegal purposes. The answer to that question must be gathered from the evidence which has been given in the cause; and upon that subject we have the evidence of Mr. *Bray*, the solicitor, by whom this will was prepared; and he states, in his first examination, in answer to the 13th interrogatory, that the testator *Joseph Russell* devised and bequeathed his residuary estate to the Defendants, *William Jackson* and *Thomas Aston Jackson*, intending them to hold it on a secret trust. When this witness was first examined he demurred to the questions relating to the trust. That demurrer was overruled by the Court. He was examined a second time; and at the hearing of the cause an objection was taken to the admissibility of his evidence on a motion to suppress the deposition; I, however, thought the evidence was admissible<sup>(a)</sup>; and, therefore, it is necessary to see what he says on the subject of the secret trust in his further deposition.

In his further deposition Mr. *Bray* says, in answer to the 13th interrogatory, the secret trust inquired of was that stated in my answer to the 6th interrogatory; and in his answer to the 6th interrogatory, he says:—"The general purport and effect of the instructions which I received for the preparation of the will of the testator *Joseph Russell*, were declaratory of his intention to leave his property for the purpose of establishing a school for the education of children in the doctrines of Socialism, and, so far as I recollect, according to the principles of *Robert Owen*. I do not recollect whether those written instructions contained the names of persons to whom the testator intended

(a) See 9 Hare, 387.

to leave legacies, or the amount of such legacies; but my attention was principally directed to the peculiar intention of the testator as to the disposition of his property for the purpose aforesaid. I cannot recollect whether the instructions mentioned any real estate or residue of his property; but my impression is, that the instructions were, generally, to leave his property as I have before stated. I well recollect that the instructions contained the scheme on which the testator intended that the proposed school should be conducted." We have, therefore, the evidence of Mr. *Bray* establishing directly the fact that the gift was on a secret trust, and that that secret trust declared the intention of the testator "to leave his property for the purpose of establishing a school for the education of children in the doctrines of Socialism."

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In addition to the evidence which is given by Mr. *Bray* on that subject, we have also proof of the statement made by this testator before his death, that he could not give or make dispositions in favour of other persons who applied to him to leave legacies, because he had left his property for the purpose of founding a school. We have also evidence of conversations between one of the Defendants and different persons, from which it appears there is something very nearly approaching to (I do not say actually amounting to, but approaching to) an admission on his part, that the property was given to the Defendants on trusts; and, on this state of the evidence, without an attempt on the part of the Defendants to disprove the case by cross-examining Mr. *Bray* on that subject, and without any further evidence given by them than that they were members, and that the testator was, as they say, a member of the Church of *England*, I think I should not be justified in holding that there is not proof of an intention on the part of the testator to give this property to the De-

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endants upon a trust for the purposes of founding a Socialist school.

It was argued that it was unnecessary, or might be unnecessary, to go further into the case; because, if it appeared that the testator's intention was to give the property upon a secret trust for charitable purposes, whether the intention was communicated to the devisees or not, the law would not allow that intention to take effect. I do not think it necessary, nor would it be wise in me, to give any opinion on that point. In the present case, I think it is clearly proved, that, whatever were the intentions of this testator, they were communicated to these devisees. I think it appears sufficiently established by the evidence, that the original instructions for this will, drawn up by the testator, and stated by Mr. *Bray* to have contained the scheme for founding this school, were taken by *William Jackson*, one of the Defendants, and delivered to Mr. *Bray*, the solicitor by whom the will was prepared. Whether *William Jackson*, at the time, knew the contents of those instructions or not, is not in proof; but there is in proof, that, in the course of the conversation which took place between Mr. *Bray* and *William Jackson* on that occasion, Mr. *Bray* stated his doubts whether the intentions which were expressed by the testator in the instructions could legally be carried into effect. That led to an interview between Mr. *Bray* and the testator and, certainly, *William Jackson*; and I think, upon the evidence, I am justified in saying that *Thomas Aston Jackson* was present at that interview, though I do not think it material to consider whether he was there or not. The result of the evidence as to what passed at the interview is, that the doubts which Mr. *Bray* had before expressed to *William Jackson*, as to the power of the testator to make the disposition he intended in favour of the charity, were repeated by him in the presence of the testator; and what then



passed is to be found in the answer of Mr. *Bray* to the eighth interrogatory, where he says:—"When I accompanied *William Jackson* to the house of the testator, on the 7th of July, 1840, as stated in my former examination, I referred to the written instructions I had received from him; and stated, as I had done to the Defendant *William Jackson*, my doubts as to the legality of his intended disposition of his property for a school for the purposes set forth in those instructions. To the best of my recollection, the Defendants *William Jackson* and *Thomas Aston Jackson* were both present; and the testator then stated, that, having confidence in the two Defendants, he would leave his property to them, being satisfied that they would carry out his intentions, which they well knew, and the Defendant *William Jackson* assented to this; but whether *Thomas Aston Jackson* expressed his assent I do not recollect, but if he was present he did not dissent."

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 —  
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What, then, must be considered on this evidence really to have passed at this interview? The testator says, I wish to give my property for the purpose of founding a Socialist school. Mr. *Bray* says, that is an intention which, by law, you cannot carry into effect. The testator then says, "I will leave the property to the two *Jacksons*: they know my wishes, and I am satisfied they will carry out my intentions." Does not that amount to an undertaking,—a promise on their part, to carry out the intentions which the testator had expressed in the will? The true test of the answer to the question is this, would the testator have left his property to the Defendants, if the Defendants had stated in answer to that question that they would not carry out the disposition which the testator intended to effect through the medium of the trust, which he had declared on the instructions. No one can doubt, that, if these Defendants had stated that they would not carry out the intentions of this testator, this disposi-

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tion in their favour would not have been found in this will. Then, if the disposition in their favour is made, and made only for the purpose of carrying out the testator's intentions, and made upon their assent, and undertaking that those intentions shall be carried out, surely it must be considered as an undertaking by a devisee that he will carry out the intentions of his testator. Suppose a case which is more familiar and common, and shews the foundation of the rule: The case of a devise to A., and the testator saying I mean to charge that estate with a legacy of 500*l.* in favour of B., and then the devisee saying, if you do not create the charge I myself will pay the legacy to B.—what is the law on the subject? It is perfectly clear, that, in that case, the devisee would be bound to pay the legacy, through the equity which would attach on him in this Court. So, I think, in the present case, the assent on the part of *William Jackson* to this devise fixed on him a trust which this Court would not permit to be defeated by the subsequent act. I think, upon the evidence, I am justified in saying that *Thomas Aston Jackson* was present on this occasion and did not dissent. I think the true result of the evidence is, that he was present at the interview; though I might not be justified in saying he was present at the time when the assent was given by *William Jackson*. But, whether *Thomas Aston Jackson* was present or not, the evidence is, I think, clear that the gift would not have been made to him but for the promise given by *William Jackson*, that the intentions of the testator should be carried into effect; and I fully agree to the principles laid down in *Huguenin v. Baseley* (a), followed in many other cases, that no person can claim an interest under a fraud committed by another. However innocent the party may be, if the original transaction is tainted with fraud, that taint runs through the derivative interest, and prevents any party from claiming under it.

(a) 14 Ves. 289.

I am of opinion, therefore, on the facts of this case, that it is proved there was a devise of the residuary estate of this testator to these Defendants on a secret trust.

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 Judgment.

The case was, however, argued in this point of view:— It was said, that, although there was a trust, the trust was not definite; that, in order to create a trust, you must find a certainty of subject and of object; and that there was here no certainty of one or the other; and cases of precatory trusts were referred to, rather than cited, in support of that view of the case. I think cases of this description are entirely distinguishable from cases of precatory trusts. In cases of precatory trusts, where a man gives a certain sum to *A.*, hoping or believing or confiding that *A.* will make some disposition in favour of *B.*, the certainty or uncertainty of the disposition intended by the testator in favour of *B.* affords a criterion of whether it was the intention of the testator or not to bind *A.* by the trust; because, if it be uncertain what amount was to be given to *B.*, it would be in the power of *A.* to cut down *B.* to nothing, and therefore the testator has expressed no definite intention in favour of *B.*; and thus the uncertainty of the subject and of the object in those cases determines, or has gone far to determine, the question, whether the intention of the testator was to create a trust or not. But, in the present case, there is no doubt of that intention. Here there is the absolute undertaking given by the devisee, to apply the money to a particular design and purpose indicated by the testator; and this case, therefore, seems to me to fall rather within the principle of another class of cases than within that of precatory trusts: I mean that class of cases which says, that, if there be fraud, it lies on the party who has been guilty of the fraud to sever the disposition which is affected by the fraud from that which is not affected by the fraud. As for instance, in the case of a trustee, who has mixed up monies belonging to

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his trust with monies of his own, the onus is on him to distinguish that part which is affected by the trust from the part which is not affected by the trust; and if he fails in making that distinction, to the extent he so fails the Court holds the property to be bound by the trust: and so in the present case, I am disposed to think the effect of there being any uncertainty (if there be any) as to the portion of the property which was intended to be bound by this trust, would be to throw on the Defendants the onus of distinguishing that which was to be bound by the trust from that which is alleged to be unaffected by it. On this part of the case, I am of opinion that there is a trust sufficiently proved.

With respect to the object of the trust, I think it is proved sufficiently, that the trust attempted to be created was either illegal or charitable. But, supposing it is not proved that the trust was illegal or charitable, still it is clear that the devise was made to these Defendants, for the purpose of holding it upon trust; and, being held by them on trust, the result, as I conceive, is, that they cannot take beneficially in any view of the case.

I am of opinion, therefore, that there must be a declaration, that, it appearing by the evidence that the residuary property was given to these Defendants upon trusts, which, as to the monies arising from the sale of the freehold and leasehold estates, could not by law take effect, those dispositions, so far as they relate to the respective monies to arise from the sale of the freehold and leasehold estates, are void; and that the Defendants, the *Jacksons*, are trustees for the heir-at-law and next of kin of the testator in respect of monies arising from those dispositions.

There remains then a question arising between the next of kin and the *Attorney-General* as to the pure personalty. Now, on looking at the evidence, I am not

quite satisfied on the question which has been raised of the nature of the doctrines of Socialism. What is said on that subject is this, that the leading principle of the society or sect is, "to establish a new system, called the rational system of society, derived solely from nature and experience, and ultimately to terminate all existing religions, governments, laws, and institutions." Now those are stated to be the doctrines of Socialism as propounded by *Robert Owen*; but whether this testator was clearly referring to the doctrines of Socialism as propounded by *Robert Owen*, or not, rests, I think, on rather loose evidence; for all the evidence that I have been able to find on the point is, that Mr. *Bray* says, "that the instructions which he received from the testator were declaratory of his intention of establishing a school for the education of children in the doctrines of Socialism, and, so far as I recollect, according to the principles of *Robert Owen*." Whether there be any doctrines of Socialism other than the doctrines of Socialism founded by *Robert Owen*, and what such other doctrines of Socialism are, I do not know. At all events, there is a sufficient case for inquiry on this point; and I think, moreover, that the case is a proper one on which to direct the inquiry, inasmuch as the matter is not in issue between the *Attorney-General* and the Plaintiff, and therefore there is nothing in truth on which I could adjudicate as between them on the question whether the property is given on an illegal or on a charitable trust.

The will contains no trust for the payment of debts. The words are: "all the rest and residue of my freehold and leasehold property, stock in trade, household furniture and effects, whatsoever and wheresoever," upon trust to sell, and receive the money to arise from such sale, "and stand and be possessed thereof, in trust to pay and discharge the legacies hereinafter by me given and bequeathed." The debts therefore will not fall on the freehold estate. The

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declaration will be, that the funeral and testamentary expenses and debts be paid pro ratâ out of the pure personal estate and personalty affected with land, and that the legacies be paid pro ratâ out of the freehold, leasehold, and personal estate. It must be referred to the Master to take an account of the freehold, leasehold, and personal estate, distinguishing all parts of the personal estate which by law could not be given for charitable purposes; and then to take also the usual account of the testator's funeral and testamentary expenses and debts. The Master will take an account of the rents and profits which have been received, and inquire what would be the proper proportion of the debts and of the legacies to be paid out of the three several properties according to those declarations. And he will also inquire what are the doctrines of Socialism referred to by the testator. And further directions and costs will be reserved.

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Dec. 2nd, 3rd,  
4th & 6th.

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Jan. 8th.

## FORDHAM v. WALLIS.

A CREDITOR'S bill for the administration of the real and personal estate of *George Starkins*, deceased. The Plaintiffs were the executors of *Edward King Fordham*; and the debt on which the suit was founded was claimed to be due upon a joint and several promissory note of

The testator devised certain estates to trustees for the payment of his debts, and appointed the same trustees his executors, and devised

other estates in various portions, some to the same trustees for the separate use of married women for life with remainders over, others to devisees in fee, and others to devisees for life with remainders over in tail, and of some of which estates the testator created terms for raising specific sums of money, and others he charged with legacies and annuities. The testator died in January, 1843. On a bill filed in August, 1849, by the payee of a promissory note made by the testator (on which it was proved that interest had been paid by the executors up to 1847), for payment of the note out of the real as well as the personal estate, against the executors and trustees, some of whom were insolvent, against the residuary legatees who had received payments on account of their residuary shares, and against the parties beneficially interested in the real estate, of whom some set up the Statute of Limitations in bar of the demand, some omitted to do so, and others were out of the jurisdiction:—

*Held*—

That payment of interest is an acknowledgment of a debt; and, upon a general acknowledgment of a debt where nothing is said to prevent it, a general promise to pay is to be implied: and such an acknowledgment made by a party filling the two characters of beneficial devisee and executor, will be attributed to both characters and not to one only, for the moral obligation does not attach more to one character than to the other. But it is otherwise where the characters held by the party are entirely distinct, as where he is personally liable as debtor, and is answerable also in the character of executor or trustee of another; for he then represents two persons, and the question in such a case is by whom the promise is made, and not what is its extent or effect.

That the payment of interest of a debt of the testator by his executors, they being also trustees of his real estate not subjected by the will to debts, did not necessarily keep the debt alive as against such real estate, for, although the executors and trustees were the same persons, they filled different characters; and where the payment was made by them in the character of executors only, the real estate was not affected by it.

That the creditor was entitled to a decree as against the parties beneficially interested in the real estate who had omitted to claim the benefit of the Statute of Limitations.

That the heir or devisee of the real estate of a testator might themselves take proceedings for securing the due application of the personal estate in the payment of the debts, and in exoneration of the real estate; and that they cannot, therefore, after a lapse of time, successfully resist the claim of a creditor, as against the real estate, on the ground of his laches in not suing earlier for the recovery of the debt.

That the demand of a simple contract creditor as against the real estate of a testator, which would otherwise be barred by the Statute of Limitations, was not kept alive so as to preclude the operation of the statute, by the effect of any right, which might exist or might have existed among the parties, to have the assets of the testator marshalled.

That payments by executors to residuary legatees, whilst the debts of the testator remained unpaid, was a breach of trust; and that, the debts having been kept alive against the executors, the statute was no bar to the claim of the creditor, as against the residuary legatees, to the extent of their interest in the residue, and they must therefore refund the monies they had received on account of the estate.

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 Statement.

*George Starkins* and *George Starkins Wallis*, dated the 14th of November, 1826, for the sum of 2000*l.* and interest.

*George Starkins*, by his will, dated the 18th of October, 1837, devised certain estates, called *White's* and *Oate's* farms, to *George Starkins Wallis*, *Frederick Chaplin*, and *Frederick Woodham Nash*, to the use of those three parties during the life of *Sarah Wedd*, the wife of *Charles Wedd*, in trust for her separate use, with remainder, as to *Oate's* farm, to *Sarah*, the wife of *Thomas Chaplin*, for her life, with remainder to her in tail, remainder to her appointment by will, and in default to *Sarah Chaplin* herself in fee; and, as to *White's* farm, with remainder to the children of the said *Sarah Wedd* (except the said *Sarah Chaplin* and except *Elizabeth Chaplin*) in tail, with remainder to such uses as *Sarah Wedd* by will should appoint, with remainder to *Sarah Wedd* in fee. He then devised two other farms, called the *High Laver* farm and the *Hogg's* farm;—as to the *High Laver* farm, to *George Starkins Wallis* for life, with remainder as to one moiety to *Frederick Chaplin* and *Frederick Woodham Nash*, during the life of *Ann* the wife of *Joseph Ellis*, afterwards *Ann Wright*, the wife of *A. Wright*, in trust for her separate use, with remainder to her children in tail, with remainder to the uses declared of the other moiety in favour of *Sarah* the wife of *Thomas Hacker Boddy*, and to her children, with an ultimate remainder to the right heirs of the survivor of *Ann Ellis* and *Sarah Boddy*; and, as to the other moiety, he devised it to *Chaplin* and *F. W. Nash*, during the life of *Sarah Boddy*, for her separate use, with remainder to her children in tail, with remainder to the same uses as he had before declared of the other moiety in favour of *Ann Wright* and to her children, and with an ultimate remainder also to the right heirs of the survivor of *Ann Wright* and *Sarah*



*Boddy.* He then devised the other farm, called *Hogg's* farm: and first charged it with an annuity of 100*l.* to *James Inkersole*; and subject thereto, he gave it to *Frederick Woodham Nash* for a term of 1000 years, with remainder as to one-half to *Thomas Inkersole* for life, with remainder to the children of *Thomas Inkersole* in tail, with remainder to his appointment by will, and with an ultimate remainder to *John Inkersole* in fee; and the other half the testator gave to *John Inkersole* for life, with remainder to the children of *John Inkersole* in fee, remainder to *John Inkersole's* appointment in fee. And the testator declared the trusts of the term of 1000 years vested in *Nash* to be for the purpose of raising a sum of 2000*l.* for *Mrs. Collier*, and another sum of 2000*l.* for *Mrs. Cheesman*. He appointed *Chaplin* trustee to preserve contingent remainders, and gave a leasing power to the tenants for life, and to the trustees, *Wallis*, *Chaplin*, and *Nash*, during the minorities, with directions for maintenance. He then dealt with three other estates, called the *Bishop Stortford* estate, the *Wallasea Island* estate, and the *Elsenham* estate. He charged those estates with debts and legacies, giving directions first as to the *Bishop Stortford* estate, then as to the *Wallasea Island* estate, then as to the *Elsenham* estate, that they should be applied in payment of his debts; and, subject to the charge of the debts, he gave one-half of all those estates to *George Starkins Wallis* in fee, and the other half to the children of *Ann Inkersole* except *James Inkersole*; and then he dealt with a house in his own occupation in *Bishop Stortford*, which he gave to *Chaplin* in fee, giving him also the property in that house; and he gave him the power to purchase the other property in *Bishop Stortford*. The testator then gave certain legacies, and bequeathed the residue of his personal estate, one half to *George Starkins Wallis*, and the other half to the children of *Ann Inkersole* (except *James Inkersole*); and he appointed *Wallis*, *Chaplin*,

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and *Nash* to be his executors. By a codicil, the testator gave another part of the estate in *Bishop Stortford* to *Chaplin* in fee; and by another codicil he gave further legacies.

The testator died on the 22nd of January, 1843.

The bill was filed in August, 1849. The Defendants were *Wallis*, *Chaplin*, and *Nash*, the executors of the testator, and the parties beneficially interested under the devises and residuary bequests contained in his will. The Defendant *Chaplin* had become bankrupt, and the Defendants *Wallis* and *Nash* were represented to be insolvent. All the real estates by the will charged with the payment of debts had been sold, and large payments had been made by the executors to the residuary legatees. And the bill prayed, in addition to the usual accounts of the debts, of the personal estate, and of the proceeds of the estates charged with the debts, a decree against the executors for wilful default; and that special inquiries might be directed, for the purpose of ascertaining the liabilities of the executors respectively, by reason of such wilful default, for the monies which should be found due from the others or other of them to the estate of the testator; and that special inquiries might also be directed, for the purpose of ascertaining the ability of the last-named Defendants respectively to make good the monies for which they should be found liable; and that *Wallis* and *Nash* might be appointed by the Court to prove against the estate of *Chaplin* for the money which should be so found due from him, and that the monies which should be recovered might be applied in a due course of administration in payment of the testator's debts; and in case the same should be found insufficient for the purpose, then that an account might be taken of the monies paid to the residuary legatees, and that they might be respectively ordered to refund such monies, and that those monies might be applied in a due course of administration in

payment of the testator's debts; and in case those monies also should be found insufficient, then that an account might be taken of all the real estate of the testator other than the estate by the will charged with the payment of his debts, and of the rents and profits thereof, which had been received by the Defendants; and that the deficiency might be raised and paid out of the rents and profits of the real estate, and by a sale of a competent part thereof; and for a receiver in the meantime.

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*Statement.*

All the Defendants to the bill set up the Statute of Limitations, except the executors and the Defendants *Cheeseman* and wife and the trustees of their settlement, who were interested in one of the sums of 2000*l.* given by the will. The evidence in the cause consisted only of the proof of the promissory note by a witness named *Thurnell*, who also stated, that there had been paid through his house of business, as the agents and on the behalf of the executors, to *Edward King Fordham*, in respect of interest on the sum of 2000*l.* secured by the promissory note, the sums following, viz. 100*l.* on the 29th of November, 1843, for one year's interest, 194*l.* 3*s.* 4*d.* on the 18th of August, 1846, for two years' interest less property tax, 97*l.* 1*s.* 8*d.* on the 13th of January, 1847, for one year's interest less property tax, and the like sum on the 1st of December, 1847. The witness stated that the means of making the three first payments were remitted to him or his house of business by the Defendant *Chaplin*, one of the executors; and that the last of the payments was made out of money in the hands of his partner and himself, belonging to the testator's estate; and the payments were accepted in satisfaction of the interest due on the produced note up to the respective periods to which the payment in each case purported to extend. Some of the devisees were also proved to be out of the jurisdiction.

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 —  
*Argument.*

Sir *W. P. Wood* and Mr. *A. Smith* for the Plaintiffs.—In addition to the grounds on which the Court proceeded, as against the several Defendants, and which will be found in the judgment, it was argued, on behalf of the Plaintiffs, that the payment of interest by the trustees of the real estate should be regarded as the performance of a duty to which the estate was liable, and, therefore, to have been made on behalf of their cestuis que trustent; and that the debt was thus kept alive against either the fee or the life interest in these estates: *Lord St. John v. Boughton* (a), *Toft v. Stephenson* (b), *Francis v. Grover* (c), *Wynne v. Styan* (d); and that even as against the Defendants interested in the real estate, who had set up the Statute of Limitations in bar of the claim of the Plaintiffs, the other Defendants would be entitled to contribution against them in respect of any debt of the testator which they might be compelled to pay; and that the Plaintiffs could enforce this right of contribution among the Defendants: *Braithwaite v. Britain* (e), *Winter v. Innes* (f): that the Plaintiffs were also entitled to have the assets, which became applicable to the payment of debts by virtue of the charge in the will or otherwise, marshalled in their favour: *Vickers v. Oliver* (g), *Gibbs v. Ougier* (h), *Ellard v. Cooper* (i), *Hughes v. Wynne* (k). Upon the cases of *Putnam v. Bates* (l), and *Brocklehurst v. Jessop* (m), comments were made to the effect mentioned in the judgment (n). They mentioned also *Whitcomb v. Whiting* (o), on the effect of part payment by one of several persons jointly and severally liable. That the argument as to the laches of the Plaintiffs was pre-

(a) 9 Sim. 219.

(b) 1 De G., Mac., &amp; G. 28.

(c) 5 Hare, 39.

(d) 2 Ph. 303.

(e) 1 Keen, 206.

(f) 4 My. &amp; Cr. 101.

(g) 1 Y. &amp; C. C. C. 211.

(h) 12 Ves. 413.

(i) 1 Ir. Chanc. Rep. 376 (1852).

(k) T. &amp; R. 307.

(l) 3 Russ. 188. See the observations on this case, *infra*, pp. 226, 227, 228.

(m) 7 Sim. 438.

(n) *Infra*, pp. 227, 228.

(o) 1 Smith's Lead. Cas. 318.

cluded by the fact, that the parties interested in the real estate might have themselves filed a bill to procure a due administration of the personal estate, and thus an exoneration of the real: *Dinning v. Henderson* (a). With reference to the claim against the residuary legatees, requiring them to refund the monies they had received, *March v. Russell* (b) and *Gillespie v. Alexander* (c) were cited.

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Argument.

Mr. Rolt, Mr. Elmsley, Mr. Glasse, Mr. Craig, Mr. Faber, Mr. C. Barber, Mr. Smythe, Mr. J. H. Palmer, and Mr. Prior, for the several Defendants.

The arguments in opposition to the title of the Plaintiff to relief as against the devisees and parties beneficially interested in the real estate are condensed and stated in the judgment. The following authorities were cited on behalf of the Defendants:—On the argument that payments of interest by the trustees and executors would not keep the debt alive against the cestuis que trustent:—*Davies v. Edwards* (d), *Atkins v. Tredgold* (e), *Scholey v. Walton* (f), *Slater v. Lawson* (g), *Tullock v. Dunn* (h). That the payments made by the executors were not in their nature sufficient to found a new promise, to revive the debt as against the real estate: *Neve v. Hollands* (i), *Smith v. Thorne* (k), *A'Court v. Cross* (l). That payments made by one in his character of executor, would not amount to an acknowledgment on which to charge the beneficial interests which such executor took as devisee; and that the rule as to joint contractors did not apply after the death of one,

(a) 2 Coll. 330.

(b) 3 My. & Cr. 31.

(c) 3 Russ. 130.

(d) 7 Exch. 22.

(e) 2 B. & C. 23.

(f) 12 M. & W. 510.

(g) 1 B. & Ad. 396.

(h) Ry. & Mo. 416.

(i) Queen's Bench, 15th April, 1852. See 16 Jur. 933.

(k) Exch. Cham., 14th Feb., 1852. See 16 Jur. 332.

(l) 3 Bing. 329.

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 —  
*Argument.*

as between his representatives and the survivor: *Way v. Bassett* (a). On the argument as to marshalling: *Busby v. Seymour* (b). That if there had been at one time a sufficient personal estate which the executors had not duly applied, the Court would not, after the time limited by the statute had elapsed, revive the debt against the real estate: *Burke v. Jones* (c), *Bateman v. Pinder* (d).—They also referred to *Ball v. Harris* (e), and *Spackman v. Timbrell* (f). And that the Defendants who had not in terms claimed the benefit of the statute, had yet, by their denial of the claim made against them, substantially relied upon the statute; and the Court would not in such a case deprive them of the benefit of that defence: *Cummins v. Adams* (g) was cited.

*Judgment.*  
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VICE-CHANCELLOR:—

In order to arrive at a satisfactory conclusion in this case, it is necessary, I think, to consider it separately with reference to the several Defendants; and, first, with respect to the executors. The Statute of Limitations not being set up, there can be no doubt that the Plaintiffs are entitled, as against them, to the usual accounts of the personal estate, and of the rents, profits, and proceeds of the real estates, charged with the payment of the debts. It was contended, however, on the part of the Defendant *George Starkins Wallis*, one of the executors (and the same argument would seem to apply on the part of the Defendant *Chaplin* and his assignees), that the acknowledgment of the debt being by the payment of interest, and the payment of interest being by him and others in the character of executors, his interest in the real estates, as beneficial

(a) 5 Hare, 55.

(b) 1 J. & L. 527; Id. 534, per Lord St. Leonard's.

(c) 2 V. & B. 275.

(d) 3 Q. B. 574.

(e) 4 My. & Cr. 264.

(f) 8 Sim. 253.

(g) 2 Ir. Eq. Rep 393, (1840).

devisee, could not be affected by the acknowledgment; and that, so far as those interests were concerned, the statute would be an effectual bar; but the statute is not set up, and if it were, I do not think this argument could be maintained either upon principle or upon authority.

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To consider the question upon principle, the bar of the statute is precluded by the payment of interest; because the payment of interest is an acknowledgment of the debt, and the law implies from the acknowledgment of the debt a promise to pay it. As is said by Lord Tenterden, in *Tanner v. Smart* (a), "Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied" (b); and this implied promise rests, as I apprehend, upon the moral obligation to pay. How, then, is it to be affected by the circumstance of the party by whom it is made holding the position both of executor and devisee? Why is it to be applied to one character rather than to another? and why not to both? Can the moral obligation attach to him less as beneficial devisee than as executor? It is true, that, in cases where the party making the payment holds two perfectly different characters (as if he be debtor in his individual character and debtor also as executor), the Courts will, as in *Atkins v. Tredgold* (c), and *Way v. Bassett* (d), look to the character in which he has made the payment; but, in those cases, although the person is the same, the characters which he fills, and the rights and liabilities incident to those characters, are in law wholly different. It is, in fact, the case of two persons, and it is necessary therefore to distinguish them. The question in those cases, in truth, is, by whom the promise is made, not what is the extent or effect of the promise.

(a) 6 B. & C. 603.

(b) Id. 609.

(c) 2 B. & C. 23.

(d) 5 Hare, 55.

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I think, therefore, that, upon principle, the distinction thus attempted on the part of the Defendant *Wallis* cannot be maintained, and that to the extent of his interest in the real estates the statute cannot operate as a bar; and the case of *Putman v. Bates*, though not decisive upon the point, seems to favour this view; for, in that case, Mrs. *Bates's* interest, both in the real and in the personal estate, were held to be affected. The same principle must, I think, govern the case as to the estates devised to the Defendant *Chaplin*.

The next case to be considered is, I think, that of the Defendant *Cheeseman* and wife, and their trustees; and, as to these parties, the statute not being set up, I do not see how their interests in the real estates can be at all protected. To the extent of those interests there appears to me to be no bar.

We come then to the case of the residuary legatees; and as to these parties also, I am of opinion, that, so far as their interests in the residue are concerned, the statute furnishes no bar. The payment over to them by the executors, whilst the debts were unpaid, was an absolute and unqualified breach of trust. The monies which have been paid to them were properly applicable to the payment of the testator's debts, and must have been so applied if they had remained in the hands of the executors; and, standing as they do in the character of volunteers, they can be in no better position than the parties by whom the payment to them was made. There must be an account, therefore, of the monies paid over to those parties.

The parties whose case is next to be dealt with are the devisees of *Oates's* and *White's* farms. These farms are devised to the three executors during the life of *Sarah Wedd*, in trust for her, with remainder to uses in favour of her chil-



dren and grandchildren; and *Sarah Wedd* and all the parties interested in remainder have claimed the benefit of the statute. The Plaintiffs being pressed on this part of their case by the weight of the decision in *Putman v. Bates*, denied the authority of that case, and insisted that it was founded on an erroneous analogy, and was contravened by the case of *Brocklehurst v. Jessop* (a). They relied upon part of the estates of the testator being charged with his debts, and upon the rights of simple contract creditors to marshal assets, insisting that, according to *Hughes v. Wynne* (b), creditors were not bound to come forward so long as they had a trustee to pay them; and that, according to *Vickers v. Oliver* (c), simple contract debts were kept alive for twenty years by the right to marshal; they also insisted, that, the executors being trustees of the life estate and having paid the interest, the debt was kept alive as to the fee, or at all events as to the life interest; and they contended, that, if they established their claim against any part of the testator's estates, there would be a right of contribution on the part of the devisees of those estates against the remaining estates, which would give them a title against those estates also. The Defendants, on the other hand, disputed all these points, and they mainly relied on the case of *Putman v. Bates*. They fortified their positions by arguments deduced from the doctrine now established at law, that the acknowledgment of a debt operates by way of a new promise; and they also relied strongly on the laches of the Plaintiffs.

I will first consider the case of *Putman v. Bates*. That case, if, as was said in argument, it has not been followed, has certainly been recognised, and has clearly not been overruled. The utmost which has been said against its authority is, that other considerations might in future

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(a) 7 Sim. 438. (b) T. & R. 307. (c) 1 Y. & C. C. C. 211.

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A debt is not to be kept alive against one party by the admission of another, except in cases of continuing joint contract.

The existence or non-existence of the demand depends upon the act of the person, and not upon the relative liability of the property.

cases be necessary to be attended to. It has stood for upwards of twenty-five years, and it would require therefore very strong and convincing reasons to justify me in departing from it, even if I was dissatisfied with the grounds upon which it rests; but, upon the best consideration which I have been able to give to the subject, I am not disposed to dissent from those grounds. The case rests upon the decisions in *Atkins v. Tredgold* (a) and *Slater v. Lawson* (b), and the principle of those cases was this—that one party was not to be bound by the admissions of another, except in cases of continuing joint contract. This principle is surely founded in justice. Apart from purely legal considerations, it cannot, I think, be doubted, that it ought not to be in the power of any person by his admissions to revive a right against another, which, but for that admission, would have been wholly extinguished, as was the case in *Channell v. Ditchburn* (c). But then it is said, that this principle ought not to have been applied to cases such as *Putman v. Bates* and the present case; that the liability of the real estate was so connected with the liability of the personal estate as to preclude the application of the principle; but I think that what we have to consider in these cases is, the act of the person, and not the position of the estate; for the existence or non-existence of the demand depends upon the act of the person, and not upon the relative liability of the property. I adopt, therefore, the principle of *Putman v. Bates*.

It is to be considered, then, whether the application of that case is displaced by the other grounds on which the Plaintiffs have relied. It is said, that the case was contravened by *Brocklehurst v. Jessopp*, and I admit that in principle it is difficult to distinguish the two cases; there it seems to have been considered that the debt would be

(a) 2 B. & C. 23.

(b) 1 B. & Ad. 396.

(c) 5 M. & W. 494.

kept alive against the personal estate by payments made out of the real estate; whereas, in *Putman v. Bates*, the debt was held not to be kept alive against the real estate by payments made out of the personal; but *Putman v. Bates* was not cited in *Brocklehurst v. Jessopp*; and what fell from the Court in that case was a dictum merely, the case having ended in inquiries.

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It is then said, that this case is to be distinguished by the testator's having charged part of his estates with the payment of his debts; but I think no distinction can be maintained upon that ground, for the testator has charged only part of the estates; and as to those which are in question, and which are not charged, the creditors had not, as in *Hughes v. Wynne*, any trustee to pay them.

It is next said, that, under the doctrine of marshalling, the right of the Plaintiffs must be considered to subsist for the period of twenty years; and *Vickers v. Oliver* and *Gibbs v. Ougier* (a) are relied on upon that point. But, upon examining the case of *Vickers v. Oliver*, it will, I think, be found that the judgment does not at all bear out the marginal note as to the simple contract creditor not being barred by the lapse of less than twenty years; and in *Busby v. Seymour* (b), that case seems to me to be referred to the true ground on which, by the judgment, it was rested (c). And with reference to the case of *Gibbs v. Ougier*, it goes no further than to decide that the Court will marshal the assets, although the right to marshal may not be distinctly raised by the pleadings; it does not at all affect the question which arises in the present case, whether the Court will do so at the instance of a Plaintiff whose immediate right against the real estate is barred by the Statute of Limitations. I can find no authority which

(a) 12 Ves. 413. (b) 1 J. & L. 527. (c) Id. 534, per Lord St. Leonard's.

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goes to that extent. Simple contract creditors have now a direct right against the real estate in case of a deficiency of the personal. They do not require the aid of this Court to marshal the assets in order to give them a remedy against the real estate; and for whatever purpose the doctrine of marshalling may be necessary to be kept on foot, I do not think that it ought to be kept alive for the purpose of giving indirectly a right which could not be asserted directly. The consequence would be, that, in all cases where there are any specialty debts, the simple contract creditors would be entitled to sue the real estate at any time within which the specialty creditors could have sued; in effect, to create in equity the same limitation as to simple contract debts, as the statute has prescribed as to specialties. This, probably, is the point to which the observations upon *Vickers v. Oliver* made by the late Lord Chancellor in *Busby v. Seymour* were addressed.

It is then said, that, as to the fee of these estates, or, at all events, as to the life interest in them, the Plaintiffs' debt has been kept alive by the payments of interest made by the executors, those executors being also trustees of the life estate. But, although the executors and the trustees are the same persons, they fill wholly different characters; and it is, therefore, as I think, necessary upon this point to examine the character in which the payments were made. Looking at the evidence with that view, I feel no doubt that these payments were made by the executors in their character of executors, and in that character only; and I am of opinion, therefore, that the real estate is not affected by those payments. In this view of the subject, it is unnecessary to refer to the cases which were cited as to the cestuis que trustent being bound by payments made by their trustees (cases, however, which depended on a different statute), or to the question whether payments of interest by a tenant for life would keep

alive the debt against the fee; and I therefore abstain from giving any opinion upon those points.

The Plaintiffs then, lastly, rested their case upon the right of contribution. And they relied, as to this point, upon the cases of *Braithwaite v. Britain* (a) and *Winter v. Innes* (b); but those cases were cases of partnership. The simple question, whether the estate of the deceased partner would, notwithstanding the Statute of Limitations, continue liable, so long as the remedy was not barred against the surviving partner, was not decided by either of those cases; and there are peculiar considerations arising out of the relation and authority of partners which do not affect the cases of joint and several debts contracted independently of partnership. I think, therefore, that the authority of those cases does not reach the present. And, looking at the question upon principle, I do not see upon what ground parties, who might have availed themselves of the statute and have neglected to do so, can insist upon contribution from other parties who have set up the statute, and have, upon the footing of it, succeeded in repelling the demand against them. I think this equity for contribution must be left to be tried by the parties whose estates may be made liable; and that the Plaintiffs cannot succeed in maintaining their case against the devisees of those estates upon that ground.

The only remaining case to be considered is, that of the parties interested under the devise of *Hogg's Farm*, with the exception of Mr. and Mrs. *Cheeseman* and their trustees, as to whom I have already disposed of the case. The same principles which governed the last case seem to me to govern this; and I am of opinion, therefore, that the Plaintiffs' case fails as to these parties also.

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That parties, who being joint and several debtors had availed themselves of the statute, and have been held liable to debts which the statute would have barred, cannot insist upon contribution from other joint and several debtors, who have protected themselves by setting up the statute from their liability in respect of the same debts—semble. But whatever the right to such contribution may be, it does not entitle the creditor to insist upon its application as against the debtors, who have so protected themselves.

(a) 1 Keen, 206.

(b) 4 My. & Cr. 101.

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Much reliance was placed in the argument for the Defendants upon the laches of the Plaintiffs. In the view which I have taken of this case, it is unnecessary for me to give any opinion upon the effect of this laches; but it may be right for me to say, that I do not at present see any sufficient ground for withdrawing from the intimation which I threw out during the argument, that the Defendants would themselves have a right to secure the due application of the personal estate; and that they could not, therefore, succeed against the Plaintiffs upon the ground of their having neglected to do so.

Mr. and Mrs. *Boddy* being out of the jurisdiction, I do not think any sale of Mrs. *Boddy's* life interest in remainder could in any event be now directed; but, at all events, I can give no such direction as the case now stands, for the evidence does not shew when Mrs. *Boddy* went abroad; and I am not satisfied that the statute might not, therefore, be a bar in her case also.

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On the point with regard to the costs of the suit of the Defendants, who, having claimed the benefit of the statute, were dismissed, the VICE-CHANCELLOR said:—

I cannot give the costs against the Plaintiffs. It was a case fairly open to argument. I do not think the estate could have been cleared, except by the decree of the Court; and these Defendants, therefore, get that benefit from the suit.

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*Minute.*

LET the following accounts and inquiries be taken and made: 1. An account of what is due to the Plaintiffs and all other creditors of the testator. 2. Of the funeral expenses. 3. Of the personal estate come to the hands of the executors. 4. Of the outstanding personal estate; and let the personal estate be applied in due course, &c. 5. Whether the Defendant *F. Chaplin* was indebted to the testator at his death; and if such debt be to any extent and under what circumstances unpaid. 6. Whether the testator at his death was surety for the Defend-

ant *G. S. Wallis*; (particulars, and whether paid or still due). 7. What parts of the testator's real estate were charged by his will and codicils with the payment of his debts and funeral expenses; what parts had been sold, mortgaged, or incumbered by the Defendants *Wallis, Nash, and Chaplin*, or any of them, and for what consideration and under what circumstances, and whether any and which remain unsold. 8. Of the receipts of *Wallis, Nash, and Chaplin*, or any of them, in respect of such sale, mortgage, or incumbrance. 9. Of the rents, profits, and produce of the real estate so charged with debts, &c. by *Wallis, Nash, and Chaplin*, or any &c., up to the sale thereof. Liberty to the Plaintiffs to prove for what might be found due from *Chaplin* under the fiat against him; but the Plaintiffs are not to recover any dividends in respect of such proof; and let the Defendants (the assignees) pay the same into Court. Let *Wallis* and *Nash* answer personally what shall be found due from them. 10. Declare, that, so far as may be necessary for the payment of testator's debts and funeral expenses, the several residuary legatees are liable to refund the monies received by them respectively in respect of their shares and interests of and in the residue of the testator's estate. 11. Of the monies so received by the residuary legatees respectively in respect of such shares, &c.; and when the same were so respectively received. 12. Whether the monies so received by the residuary legatees respectively can be recovered. Declare that the estates and interests of the Defendants *Wallis* and *Chaplin*, and of *F. F. Cheeseman* and *Elizabeth* his wife, and of the Defendants, the trustees of the settlement on their marriage, in the real estates devised by the will of the testator, and not charged with the payment of his debts, are subject to the payment of the testator's debts and funeral expenses, and ought to be applied in payment thereof, so far as what shall be recoverable from the executors and from the residuary legatees and the estate of *Chaplin* shall be insufficient for that purpose. 13. Of what such estates and interests respectively consist; and whether the same, or any, and which of them, or any and what parts thereof respectively, have been sold, mortgaged, or otherwise incumbered by the Defendants *Wallis, Chaplin, Cheeseman* and wife, or any &c., and when and to whom, and for what consideration, and under what circumstances. Dismiss the bill as against *Sarah Wedd, Thomas Chaplin*, and *Sarah* his wife, *Thomas Chaplin* the younger, *Sarah Elizabeth Chaplin, Charles Wedd, Mary Stockins Wedd, George Wedd, Andrew Wright* and *Ann* his wife, *Amis Ellis*, and *Francis Smith*, without costs. Receiver of the outstanding personal estate. Reserve all questions as to interest on monies received by the residuary legatees in respect of their shares, &c. Adjourn the further hearing. Liberty to apply.

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## COWMAN v. HARRISON.

A gift of the yearly interest, dividends, proceeds, and profits, to arise from the shares of the testator in a pottery, ship-building yard, shipping, trust-mones, effects, and premises, to his wife for her life, for the maintenance, education, and support of herself and his children; and, subject to some bequests and trusts for the advancement of the children, a bequest of the residue to the children equally: and the testator particularly recommended, desired, and directed his wife, at his decease, by will or otherwise, to divide or dispose of what money or property she might have saved from the yearly income thereinbefore given to her, amongst all his children, in equal shares:

—*Held*, that

the attempted disposition of the savings of the widow was in the nature of a precatory gift; but, the widow having taken a beneficial interest, and being empowered to spend the whole, there was no certainty of the subject of the gift, and no trust created of the savings in favour of the children; and that the same, therefore, belonged to the estate of the widow.

A bill by a legatee, claiming under the will of another legatee, who took under the will of the original testator, bringing forward various claims against the representatives of the original testator, and the representatives of the first and second legatee, may be multifarious, although all the claims are in some manner derived from, or connected with, the estate of the original testator.

**JOHN BARWISE**, by his will, dated in 1818, gave to his wife *Joanna*, during her life, if she should so long continue his widow, the use, possession, and enjoyment of his household goods, furniture, plate, &c.; and after the death or second marriage of his wife, he gave the same among his children, in such shares and proportions as his wife might think proper to will or order the same. And the testator devised and bequeathed the residue of his real and personal estate, including, among other things, his shares in a pottery, ship-building yard, shipping, &c., to three trustees, their heirs, executors, &c., upon trust, to get in the personal estate, and, in the first place, to pay his debts and funeral and testamentary expenses, and the costs of executing the trusts of his will; and after payment thereof, in trust, to invest the residue, and to permit and suffer his wife, *Joanna*, to have the use, possession, and enjoyment of his messuage or dwelling-house, garden, and premises at *Granby-row*, so long as she should choose to reside there, and also to let and set his real estate, and receive and take the rents, issues, and profits thereof, and also the yearly interest, dividends, proceeds, and profits to arise from his parts and shares in the pottery and ship-building yard at *Whitehaven*, shipping and shares of ships, trust monies, effects, and premises, and pay the same from time to time, as and when they should be received, unto his wife *Joanna*, during her life, if she should so long continue his widow, and for the maintenance, education, and



support of herself and his children, subject, nevertheless, to the proviso thereafter mentioned. And after certain provisions for the payment of 500*l.* each for the advancement of his two sons, *Thomas* and *John*, and for the settlement of the like sums of 500*l.* each on his three daughters, *Elizabeth*, *Juliana*, and *Joanna*, and making some specific devises and pecuniary bequests, after the decease or second marriage of his wife, for the respective benefit of his said sons and daughters, and bequeathing all the residue of his personal estate unto and equally between and amongst his said five children, share and share alike, with a provision for survivorship between the sons in case of the death of either of them without leaving issue before they came into possession of the property given to them; and amongst the daughters, in case of the death of any of them without leaving issue before attaining twenty-five, the testator particularly recommended, desired, and directed his wife, at her decease, by will or otherwise, to divide or dispose of what money or property she might have saved from the yearly income thereinbefore given to her, amongst all his children in equal shares.

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The testator died in 1827. *Thomas*, the son, died in 1831, in the lifetime of *Joanna*, the widow, and leaving *John*, the other son, surviving. *John* died in 1845, having, by his will, dated in 1839, devised and bequeathed his real and personal estate in trust for his three sisters *Elizabeth*, *Juliana*, and *Joanna*, for their respective lives, with remainder to their respective issue, and, in default of issue, as they should respectively appoint.

*Joanna*, the widow, died in 1847, having, by her will, made shortly before her death, specifically bequeathed various articles of furniture, plate, &c., to her said daughters, giving the residue thereof to her daughter *Elizabeth*, with direction that she should allow one-half of the value

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out of her interest in the general residuary estate in augmentation of the provisions for her daughter *Joanna*; and she thereby bequeathed her residuary personal estate for the benefit of her daughters *Elizabeth*, *Joanna*, and *Juliana*, and their children; if no children, for the survivors of the daughters.

*Joanna*, the daughter, died in 1849, having appointed the Plaintiff *Jane Cowman*, and the Defendant *George Barwise*, her executrix and executor, and having given the Plaintiff a beneficial interest in her estate. The bill was filed in July, 1851.

The Defendants were the executors of the testator *John Barwise*, and his surviving children, and the representatives of his deceased children, and also the children of such surviving and deceased children: and the claims made by the bill were, first, the savings of the income of *Joanna*, the widow, under the will of the testator *John Barwise*, the father; secondly, the legacies of *Joanna* the younger, under the same will; thirdly, shares of the pottery, as a part of the unadministered residue of the personal estate of the same testator, and also other shares in the same pottery, under a deed of 1833, by which additional shares were acquired by the executors, on the trusts declared of his residuary estate; fourthly, a share of the furniture, as a specific bequest under the same will; and, fifthly, a share of the residuary estate of *John Barwise* the younger, under his will; and in the first, third, and fourth of these claims, in addition to the direct claim of *Joanna* the daughter, under the will of the testator, the Plaintiff claimed further shares derivatively under the will of *John Barwise* the younger.

The bill charged, that the testatrix *Joanna* the widow, under the will of *John Barwise* the father, was only entitled to the plate, furniture, and effects for her life; and

that the said plate, furniture, and effects, which had been sold, as stated in the bill, or a large proportion thereof, and the articles, by the will of *Joanna* the widow, purported to be specifically bequeathed, passed under and were subject to the trusts of the will of *John Barwise* the father; and that the residuary personal estate of *Joanna* the widow consisted of, or was derived from, her savings, during her life accumulated and saved by her out of the rents, interest, and annual proceeds of the trust property, to which she became entitled during her life under the said will of *John Barwise* the father; and that such savings and accumulations passed under and were subject to the trusts of his will, in favour of his children; and that two messuages at *Granby-row*, devised by the will of the widow, having been purchased by monies out of the savings, were also subject to the same trusts.

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With the exception of adverting to the point as to multifariousness, the only\*part of the case which is material as the subject of a report, is that which relates to the savings of the widow.

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Mr. *Rolt* and Mr. *Riddell*, for the Plaintiffs, distinguished the gift of savings from gifts of the character of that in *Ross v. Ross* (a). They relied on *Surman v. Surman* (b), in which, after a gift to his widow for her life, with power to apply it for her own benefit, and in the maintenance of his nephew and daughter-in-law, there was a gift, upon her decease or second marriage, of so much as should then remain, unto the nephew and daughter-in-law; and it was held, that the remainder of the capital unapplied was well limited over. They cited also *Briggs v. Penny* (c), *Eade*

Argument.

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(a) 1 J. & W. 154.

(b) 5 Madd. 123.

(c) 3 Mac. & G. 546.

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v. *Eads* (a), *Woods v. Woods* (b), *Longmore v. Elcum* (c),  
*Raikes v. Ward* (d), *Crockett v. Crockett* (e).

Mr. *Bethell* and Mr. *Osborne*, for the Defendants *Harrison*, *Fox*, and *John and Elizabeth Dawson*, cited *Harland v. Trigg* (f), cited in *Horwood v. West* (g) per Sir *John Leach*, *Pushman v. Filliter* (h), *Malim v. Keighley* (i), *Browne v. Paull* (k), *Knight v. Knight* (l).

Mr. *W. W. Cooper* and Mr. *Prout* for other Defendants.

Judgment. VICE-CHANCELLOR:—

It appears by the correspondence which is in evidence, that it has been agreed that no objection shall be taken in this suit on the ground of multifariousness; and I do not feel inclined to create any difficulty on that ground; though I have no doubt that the suit is open to that objection, and that it would be matter of great difficulty to deal with these multitudinous claims in one record.

The first question which arises, is upon the right of the children and parties claiming through them under the will of *John Barwise* the father, to the savings of the income of *Joanna* the widow. [His Honour read the material passages of the will as to the savings, *supra*, p. 235.] Two views were put forward as to the effect of this clause with regard to the savings. The Plaintiffs argued, that it was a gift of the income to the widow for her life, with a gift over to the children of so much as she might not spend, bringing

- (a) 5 Madd. 118.
- (b) 1 My. & Cr. 401.
- (c) 2 Y. & C. C. C. 363.
- (d) 1 Hare, 445.
- (e) 2 Ph. 553.
- (f) 1 Bro. C. C. 142.

- (g) 1 S. & S. 387.
- (h) 3 Vea. 7.
- (i) 2 Ves. jun. 333, 531.
- (k) 1 Sim., N. S., 92.
- (l) 3 Beav. 148; *S. C.*, 11 C. & F. 513.

the case within *Surman v. Surman* (a). On the other hand, the Defendants contended, that this was a precatory gift, a gift made by means of a request imposed upon another, to whom the beneficial interest is given. The first thing to be considered is, within which class the disposition falls, which must be determined by the subject of the gift, and the terms of the bequest. The subject of the gift in this case is "savings." The "savings" are to be made by the widow. The amount of such savings is dependent entirely upon her. It cannot be imputed to the testator that he intended this part of his will as an inducement to his widow to spend the whole of her income; and if not, what then did he intend that she should save? He meant to give what she might save, but what she saved would depend entirely on her will and pleasure; and so far therefore as regards the subject of the bequest, it was to be the testator's gift; but whether there should ever be anything upon which it could take effect depended upon the will and pleasure of the widow. Then what are the terms of the bequest? The widow is to dispose of it by will or otherwise. It is under her disposition that the children are to take. They take under her disposition, made by the testator's desire, and not under any gift contained in his will. This is the very nature of a precatory gift. It is not the case of a gift to A., with a gift over of the subject to B.; but it falls within the class of cases where there is a gift to A., with a request that he will bequeath it to B. I am of opinion, therefore, that this is a precatory gift. The next question is, whether, as a precatory gift, it is good. The rule as to such gifts is, that there must be a certainty of subject; and the foundation of that rule stands on very solid grounds. The right of a donee to spend the subject matter of the gift is inconsistent with the nature of a trust; and the Court therefore collects in that case,

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(a) 5 Madd. 123.

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that there can be no intention to impose a trust. The disposition is such, that, if a trust were raised, it could not be enforced; and the Court therefore will not impute to the testator an intention to raise it. Independently of principle, I think the authorities referred to by the Defendants decide the question, and that the case falls completely within the class of cases in which the testator makes a gift of so much as shall be left at the decease of a person to whom he has given the use of the thing referred to.

It was attempted, on the part of the plaintiffs, to take the case out of these authorities by reference to the previous disposition by the will for the maintenance of his family. But it cannot be contended, that, under this previous disposition, the wife took no beneficial interest. She was bound, no doubt, to maintain the children for some period; but, subject to that obligation, she took beneficially the income out of which the savings were to come; and whatever she took beneficially, she had power to spend. There can, therefore, be no distinction on that ground.

Two cases were referred to by the Plaintiffs: *Briggs v. Penny*(a) and *Eade v. Eade*(b). In *Briggs v. Penny*, the subject of the bequest was certain. Lord *Truro* expressed a doubt only as to the vagueness of the description of the object of the gift; and he held that vagueness in the object might be counteracted by other considerations which shewed that a trust was intended, and that, this being once established, the legatee was effectually excluded. In *Eade v. Eade*, the object of the gift was certain, but the subject was uncertain. The words of request were, that the widow should, at her death, leave the remainder of *her* pro-

(a) 3 Mac. & G. 546.

(b) 5 Madd. 118.

perty to his nephew; and Sir *John Leach* observes, that, "if the testator had requested his wife, at her death, to leave the remainder of *his* property" to the nephews, there would have been a clear trust in their favour. These words would, in that case, no doubt, have given certainty to the subject. I do not think that either of those cases affects the present case. I am of opinion that this case falls within the class of precatory trusts, and that the disposition is bad; and that, as to this part of the Plaintiff's claim, the bill must be dismissed. I think also, that it must be dismissed with costs, on several grounds. Parties coming with speculative claims of this sort ought not to be permitted to try them at the expense of other persons. It must also be observed, that *Joanna* the daughter lived for two years after the death of her mother, and did not advance this claim; and that it is now brought forward for the benefit of the Plaintiff, and not for the benefit of the estate of *Joanna* the daughter. It is moreover a wholesome rule, that parties coming here with an adverse claim, in which they fail, should pay the costs of it. In this case, an offer was made to try the question in a short and inexpensive form; and it appears to me, that this suit was resorted to as a threat, and was an attempt to enforce a compromise on terms more favourable to the Plaintiff than otherwise could be obtained,—an attempt which, however frequent (and I am afraid it is too frequent), must always meet the condemnation of this Court.

[His Honour then directed certain accounts, and inquiries as to other matters in question in the suit.]

1852  
 COWMAN  
 v.  
 HARRISON.  
 Judgment.

1852.

Aug. 3rd;  
Dec. 11th &  
14th.

A purchaser of 173 shares in a Banking Company executed a deed transferring from the vendor to himself five of such shares, the purchaser thereby covenanting with the vendor and with the public officer of the Company, at all times thereafter, in respect of the shares *thereby assigned*, to pay all instalments and sums of money to become due thereon, and also to perform and keep all the covenants and stipulations of the deed of settlement of the Company, and also all other stipulations and regulations for the time being affecting holders of shares, and, if required by the directors, to execute a deed of covenant to the trustees or public officer of the Company, to observe and abide by all the stipulations and regulations affecting holders of shares in the Company. By the deed of settlement, a transferee of shares, not being theretofore a member of the Company, and subject to the provision of the deed of settlement, was to become thereby a member of the Company as to obligations, but not as to benefits until his execution of the deed of settlement; and a transferee of shares who had previously executed the deed of settlement, was to become a member in respect of the transferred shares from the date of transfer, without again executing the deed:—*Held*, that the execution of the deed of transfer was not constructively or in substance an execution of the deed of settlement; that the covenants of the deed of settlement were incorporated in the deed of transfer only so far as related to the five shares assigned by that deed; and that, by the execution of that deed, the purchaser became a debtor by specialty to the Company in respect of such five shares, but not in respect of the other shares which he purchased, and as to which he executed neither the deed of settlement nor any deed of transfer.

## HAY v. WILLOUGHBY.

THE petition of the official managers of the *North of England Joint-stock Banking Company*, on behalf of the Company, praying, that they might be admitted as creditors in respect of a specialty debt bearing interest, for the amount of the calls made or to be made on 173 shares in the Company, in respect of which the Defendant *Willoughby*, as the administrator of *Thomas Harrison*, deceased, had been inserted by the Master, under the Winding-up Act, as a contributory.

The material clauses of the deed of settlement of the *North of England Joint-stock Banking Company* are stated at length in the report of the case *Straffon's Executors*, 1 De Gex, MacNaghten & Gordon's Reports, pp. 577 et seq., and it has not been thought necessary to repeat them in this report.

In August, 1846, *Thomas Harrison* purchased of *John Fleming* twenty shares in the Company, and executed a deed of transfer of that date from *Fleming* to himself, of five shares; to which deed *G. Burdis*, the public officer of the Company, was a party. The substance of this deed is



stated in the judgment of Mr. Justice *Wightman* (a). The form of certificates delivered to *Harrison* was the same as that of the certificate which is set out in the report referred to above (b). *Harrison* afterwards purchased other shares, from time to time, to the number of 173. The petition stated, that the practice of the Company was, when several shares were purchased by one party, that an actual transfer should be executed by the vendors of a small number, as five or ten only of such shares; and that, by virtue of such transfer, the purchaser should become a shareholder of the Company in respect of all the shares purchased by him, as to which notices were given, and the purchaser accepted by the directors; and that the old certificates of shares issued in the name of the former holder of such shares should be cancelled, and new certificates given to and in the name of the purchaser; and that the shares should be transferred in the books of the Company from the name of the vendor to the name of the purchaser. That in like manner it was the practice of the Company, that, if any person to whom shares in the Company had been transferred should purchase other shares therein, and the required notices should be given by the vendor and the purchaser, and accepted by the directors in respect of such shares, no actual transfer should be executed by the vendor in respect of such shares, but that the old certificates should be cancelled and new certificates given to and in the name of the purchaser; and that the shares should be transferred in the books of the Company from the name of the vendor to the name of the purchaser; and that the purchaser should thenceforth be considered a shareholder in respect of such shares, and be entitled to all the privileges of a shareholder in respect of the same.

1852.  
HAY  
v.  
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Statement.

(a) *Infra*, p. 245. The deed of transfer executed by *Harrison* was precisely in the same form as the deed of transfer executed by *Straffon*, which is fully set out 1 De G., Mac. & G. 580, et seq.

(b) *Id.* 584.

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 HAY  
 v.  
 WILLOUGHBY.  
 Statement.

Calls were made on the administrator of *Harrison* in respect of his 173 shares, and the interest of such calls, to the amount of 8587*l*. There was one specialty creditor, whose debt was found by the Master.

Aug. 3rd.

On the opening of the case, it was ordered to stand over, that the assistance of a Judge of one of the Courts of common law might be obtained, under the provisions of the stat. 14 & 15 Vict. c. 83, s. 8 (a).

Argument.

Mr. *Rolt* and Mr. *Prior*, for the official managers, relied on the judgment of Lord *St. Leonard's* in *Straffon's Executors' case*, in which his Lordship said: "If a man is bound to execute a particular deed containing particular covenants, and, by the desire of those who have a right to call on him to execute that deed, he executes another deed, containing a covenant that he will obey, observe, and perform all the covenants in the principal deed, he becomes bound by the principal deed. So here, the purchaser became bound to observe all the provisions of the deed of settlement: he was by infusion, as it were, a party to that deed, just as much as if he had been an original party to and had executed it" (b). The case was analogous to that of a lessee who covenanted to be bound by the terms of his lease, not only as to the property comprised in the demise, but as to all other lands which he might hold of the same lessor, and which covenant would bind him in respect of lands which the lessee might subsequently take from the lessor under a parol demise.

Sir *W. P. Wood* and Mr. *Rasch*, for the Plaintiff, who was the heir-at-law and administrator of the intestate, opposed the claim of the bank to rank as specialty creditors,

a) See 9 Hare, App. xxx.

(b) 1 De G., Mac. & G. 596.

beyond the amount of the contribution of the intestate in respect of the five shares assigned by the deed of August, 1846.

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HAY  
v.  
WILLOUGHBY.  
Argument.

Mr. *Bagshaw*, for the specialty creditor, whose debt had been established, also opposed the claim of the petitioners to the same extent.

Mr. Justice WIGHTMAN.—

Dec. 14th.  
Judgment.

Upon the argument before us, the only question made in this case was, whether the *North of England* Joint-stock Banking Company were entitled to claim as specialty creditors against the estate of the late *Thomas Harrison*, on account of calls made upon his administrator as one of the contributories of the Company, under the Joint-stock Companies Winding-up Act, in respect of 173 shares in the Company held by *Harrison* at the time of his death. It was not disputed, that the administrator of *Harrison* was a contributory of the Company in respect of all his shares, *Straffon's case* (a) being a direct authority upon that point; but it was denied that he was bound by specialty for more than five of the shares.

The only deed actually executed by *Harrison* was the indenture of August, 1846; and, although in terms that deed would appear to be limited to five shares, it was contended, that, by necessary implication, it included all the shares of which *Harrison* might at any time become possessed, and incorporated all the provisions of the deed of settlement, not only as far as they might affect the five shares, but in respect of all his shares generally, whenever they might be acquired. By the indenture of August, 1846, *Harrison* covenanted with *Fleming*, the vendor of the five shares to *Harrison*, and with *Burdie* the public

(a) *Straffon's Executors' case*, 1 De G., Mac. & G. 576.

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—  
Judgment.

officer of the Company, that he should and would at all times thereafter, in respect of the said shares thereby assigned (that is, the five shares), pay all instalments and sums of money to become due thereon, and also perform and keep all the covenants and stipulations of the deed of settlement, and also all other stipulations and regulations for the time being affecting holders of shares in the Company, and should and would, if required by the directors, either expressly or by a general regulation in that behalf, execute a deed of covenant to the trustees or public officers of the Company, to observe and abide by all stipulations and regulations affecting holders of shares in the Company.

Subsequently to the execution of this deed, *Harrison* became the purchaser of other shares, which were transferred from the names of the vendors to the name of *Harrison* in the books of the Company, and fresh certificates were given in his name, the former certificates being cancelled; but the only deed of transfer executed by him was that of August, 1846, and he never executed the deed of settlement, or any other deed relating to his shares in the Company, which, at the time of his death, amounted to 173.

In 1848, it becoming necessary to wind up the affairs of the Company under the provisions of the Winding-up Act, the administrator of *Harrison* was found by the Master to be a contributory of the Company in respect of 173 shares; and calls were made on him in respect of those shares, for the purpose of the winding-up. The Company claim to rank as specialty creditors against the estate of *Harrison* in respect of those calls; which they could only be in case *Harrison* had bound himself and his representatives by deed to pay them. It seems to me, however, that although the Company may be, as indeed it was admitted

they were, entitled to rank as specialty creditors in respect of the five shares, they are not entitled so to rank in respect of any of the others. The covenant of the intestate in the indenture of August, 1846, has two parts or members; the first, that he will, in respect of the five shares, pay all instalments and sums of money to become due thereon, and keep all the covenants in the deed of settlement affecting holders of shares; and the second, that he will, if required by the directors, execute a deed of covenant to the trustees or public officer of the Company, to observe all the provisions and regulations affecting holders of shares. The first part of the covenant is in terms limited in its operation to the five shares; and if the covenants of the deed of settlement can be considered at all as incorporated, by reference, with the covenants in the indenture of August, 1846, those covenants are only so far incorporated as regards the five shares. The words "in respect of the shares hereby assigned," appear to me to override the whole of the first part of the covenant. The second part of the covenant is not limited to the five shares only; it is in general terms, that he will execute, if required, a deed of covenant to observe all provisions and regulations affecting holders of shares generally; and under that, it may be that he might have been required to execute a deed, which would have the effect of binding him with respect to all the shares that he might at any time acquire in the Company. When the intestate purchased new shares, after he had executed the indenture of August, 1846, he was a member of the Company, for the purpose of liability to demands in respect of his shares, but not for any beneficial purpose, according to the terms of the deed of settlement, as he had not executed the deed, a condition precedent, by the 32nd clause of the deed (a), to his becoming beneficially entitled as a member of the

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Judgment.

(a) See 1 De G., Mac. & G. 579.

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 Judgment.

Company. But, if he had executed a deed of settlement, and become a member of the Company, it is provided by the 33rd clause (a), that he should not be required again to execute the deed of settlement. The execution of the deed of settlement contemplated by these clauses is hardly a constructive execution; and, in the present case, the intestate neither actually executed a deed of settlement, nor any other deed containing covenants, that would apply to after-acquired as well as existing shares. The point now in question, probably, never occurred to the Company or their advisers; and they were no doubt satisfied with having their shareholders liable for calls, without considering the rank in which they should be placed in comparison with other creditors of their respective shareholders; and therefore they did not require them, it may be, to execute either the deed of settlement in fact, or any such deed of covenant as is mentioned in the second part of the covenants in the indenture of August, 1846, and in the 24th clause of the deed of settlement, which is in effect in the same terms (b).

In the case of *Straffon's Executors*, the only question was, whether they were contributories of the Company. In that case (as in this) *Straffon* had not executed the deed of settlement, but he had executed the deed in respect of a few of his shares, in terms the same as those of the deed executed in the present case by *Harrison* in August, 1846. The Lord Chancellor considered in that case, that, by the deed which he did execute, referring as it did to the deed of settlement, and by his acts suffering himself to be registered in the books of the Company and receiving a dividend on his shares, he was a shareholder of the Company for all purposes. He seems to have thought that for that purpose he might be considered constructively as a party

(a) See 1 De G., Mac. & G. 579.

(b) Id. 577.

to the deed of settlement; but there was no question in that case whether his liability to pay calls was by deed, so as to place the Company in the rank of specialty creditors; and all the incidental remarks of the Lord Chancellor mainly referred to the only question then under his consideration, which was, whether *Straffon's* executors were contributories or not, and not whether the Company would be creditors by specialty, or simple contract creditors.

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 WILLOUGHBY.  
 Judgment.

Viewing the case as a question of common law, it appears to me that an action of covenant could not have been maintained by the Company for calls on any of the shares except the five against *Harrison* in his lifetime, or against his administrators after his death. It could not be maintained upon the deed of settlement, because *Harrison* was no party to that deed, nor could it have been maintained upon the indenture which he did execute; for, even supposing that it did incorporate the provisions and clauses of the deed of settlement, it was only, as it appears to me, so far as respected the five shares which were the subject-matter of that deed, and which were assigned. I am not aware that in this respect there would be any difference between the rules of law and equity as to what was or not a specialty debt, in the administration of the estate of the deceased.

Upon the whole, I am of opinion that the Company are not entitled to rank as specialty creditors on the estate of *Thomas Harrison*, except so far as respects the five shares as to which, by his covenant in the deed of August, 1846, he was expressly bound.

VICE-CHANCELLOR:—

I am much indebted to the learned Judge for the as-

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*Judgment.*

sistance he has given me in this case, and it is particularly satisfactory to observe the working of the new system on its first introduction into this Court. Instead of having to send this case to a Court of common law, I have been enabled, by the aid of the learned Judge, to dispose of it at once, at a very trifling and inconsiderable expense.

I so fully concur in the view which the learned Judge has so clearly expressed upon the law of this case, that I think it is hardly necessary for me to make any observations upon it. It is the view which I had myself taken of the case before I had the benefit of his assistance. It may be right, however, for me to say a few words on the subject of *Straffon's case*, which undoubtedly is a most important decision.

Anterior to the decision in *Straffon's case*, very serious doubts had arisen, both on principle and authority, upon the question as to the extent to which persons could be considered contributories, where the transfer of shares had not been made to them *modo et formâ* prescribed by the deed; and, in *Straffon's case*, the able and elaborate judgment of the Lord Chancellor set at rest that question, and decided, that, although the transfer may not be *modo et formâ*, still, on the acts done by the parties, the persons to whom that transfer has been made may become shareholders in the Company, and liable, as contributories, to the debts and expenses of the Company. I think that was the view, and the only view, which the Lord Chancellor was looking to when he decided *Straffon's case*; for I find in his judgment, that, in dealing with the 33rd section, the question he puts is, not whether the execution of the deed of transfer was to all intents and to all purposes an execution of the deed of settlement, but whether the execution of the deed of transfer was, or was not,



an execution of the deed of settlement within the meaning of the 33rd clause. The Lord Chancellor considers "what the Acts of Parliament require, and how they bear on the facts of the case" (a), and he then adds, "I am perhaps taking more trouble than this case deserves from any importance that belongs to it, but I do so with a view of endeavouring to come to a right conclusion as to what the effect of the law really is, in order that it may, so far at least as my opinion goes, be understood on what grounds this Court proceeds in dealing with cases where there has been, as in the present instance, a variation from the strict rules of the deed of settlement" (b). The Lord Chancellor then proceeds to divide the consideration of the case into questions of form and of substance; and the view which I think it is clear that the Lord Chancellor intended to take was simply this, that, so far as respected difficulties of form, they might be got over by the acts and conduct of the parties, but he left entirely unaffected the question how the case would stand where the difficulty was one of substance.

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v.  
WILLOUGHBY.  
Judgment.

By the 32nd clause of the deed of settlement, if shares are transferred to one who has no shares in the Company, he must execute the deed of transfer before he will become entitled to the benefit of the shares, though he would be subject to liabilities in respect of those shares from the date of the deed of transfer. By the 33rd clause, one who has executed the deed of settlement, and is a member of the Company, and to whom other shares are subsequently transferred, is to be considered as a partner in respect of the shares subsequently transferred from the time of the transfer, without any re-execution of the deed. The view of these clauses, which the Lord Chancellor has taken in

(a) See 1 De G., Mac. & G. 590.

(b) Ibid.

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Judgment.

*Straffon's case*, is simply this,—that, having once executed the deed of settlement or the deed of transfer, by which (as the Lord Chancellor puts it) the transferee has conformed to the deed of settlement, he shall not be required to re-execute it on the transfer of new shares to him. If, on the transfer of new shares to a member of the Company, he has not executed the deed, but has executed another deed which in substance binds him to the obligations of the original deed, then there has been an execution of the deed of settlement within the true intent and meaning of the 33rd clause of the deed, distinguishing still, throughout the judgment, between the form and substance. In the present case, the attempt is to apply *Straffon's case* (which, as I consider it, applies merely to a case where there has been a want of observance of matters of form, and not to a case where the point is one of substance,) to the question, whether the execution of the deed of transfer is in truth an execution of the deed of settlement in point of substance, so as to subject the party who has executed the deed of transfer as a debtor by specialty in respect of all the obligations that would attach if he had executed the deed of settlement. I think that the decision in *Straffon's case* has no application to the present.

The question, then, must wholly rest upon the execution of the deed of transfer. By the execution of the deed of transfer, *Harrison* became liable as a specialty debtor in respect of the five shares, but liable no further. Even if the execution of the deed of transfer had the effect of importing the 33rd clause of the deed of settlement into the case, the clause must be imported as it stands; and, as it stands, it is—that there must be an actual execution of the deed of settlement in order to render the party liable in respect of subsequent shares;—the execution required to create the liability being an actual exe-

cution, although a constructive execution might be sufficient to remove a difficulty in point of form.

One argument, ingeniously put, was this:—Suppose a man covenanted by lease that he would be bound by all the covenants which were contained in that lease with reference to property he might subsequently hold under the same lessor, and he afterwards became a lessee under the same lessor by parol, would not the covenants which were contained in the original lease subject him as specialty debtor to the obligations contracted on the parol demise? No doubt they would, and for this reason, because he would have executed, under his hand and seal, the deed by which he had covenanted to perform those obligations. The case supposed is not like the present.

I am of opinion, with the learned Judge, that the intestate can only be considered to have contracted a specialty debt in respect of the five shares which were transferred to him by the deed of transfer. Our judgment will, therefore, be to that effect.

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HAY

v.

WILLOUGHBY.

*Judgment.*

1852.

Nov. 5th &  
6th.

No right in land situated in the colony of British Guiana is acquired except by a transport or conveyance in Court in the form of a judicial act; and, therefore, an assignment executed in this country of the benefit of a contract for the purchase of land in the colony, as a security for monies lent to the purchaser, to enable him to complete the purchase, confers no right, estate, interest, lien, or charge upon such land; and such land, whether it be or be not actually conveyed to the purchaser in the form required by the law of the colony, by the payment of the purchase-money becomes subject to the claims of the creditors of the purchaser generally, without the necessity of such creditor first proceeding to judgment and execution; and a transport or conveyance cannot, without notice, be made to any party other than the purchaser, thereby affording an opportunity for the general creditors of the purchaser to interpose.

## WATERHOUSE v. STANSFIELD.

THE Master, by his report, in pursuance of the reference in this cause (see 9 Hare, 240), set out the facts stated by the claim, and whereby it appeared that *Shute Barrington Moody* having contracted to purchase from *William Grant* the west half of the concessions of or lots Nos. 20 and 21, *Water-street*, with the buildings thereon, and part of Mud Lot, No. 21, in *Water-street, George Town, Demerara*, in the colony of *British Guiana*, borrowed a sum of money from the Plaintiffs, part of which was paid to *Grant* in respect of the purchase money, and that *Shute Barrington Moody* executed a deed, purporting to convey the property comprised in the contract to the Plaintiffs, as security for the loan and interest, but became bankrupt before any transport or conveyance had been made to them in the form required by the laws of the colony. The report found, that, on the 30th of October, 1846, *Grant* wrote to his agent in *Demerara*, and informed him that the whole of his purchase-money had been paid, and directed him to pass the estate to *Shute Barrington Moody*, or to pass a mortgage to such person as *Shute Barrington Moody* should think proper to name; that *Thomas Porter*, the Plaintiff's attorney, took divers proceedings in the colony for completing the transport and conveyance of the premises to *Shute Barrington Moody*; and that, on the 17th of February, 1847, the transport of part of Mud Lot, No. 21, in *Water-street*, was passed to *Shute Barrington Moody*; but that, by reason of some mistake or error on the part of the officer of the Court there, the transport of the west half of the concessions of or Lots Nos. 20 and 21, in

*Water-street, South Cummingsbury*, was not completed at the time of the bankruptcy of *Shute Barrington Moody*.

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v.

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Statement.

The Master also found, that, according to the law of the colony of *British Guiana*, no right, estate, or interest, by way of charge, mortgage, or lien, is created or can be acquired in any real property within the colony, except by a deed by way of mortgage, duly passed before a judge of the supreme court of civil justice in the colony, notice of such mortgage having been previously published, for two consecutive weeks, in the official gazette of the colony; and which deed, so passed before the judge, becomes a judicial act, and is in the nature of a judgment of the said Court. And, upon consideration of the several matters aforesaid, he found, that, according to the laws of *Demerara*, the Plaintiffs did not, under or by virtue of the said indenture of the 10th day of October, 1846, or by the payment made by them to *William Grant* on account of the purchase-money of the premises comprised in the contract of the 14th of August, 1845, acquire or become entitled to any right, estate, or interest, lien or charge, in, upon, or against the premises comprised in the said contract, or upon or against *Shute Barrington Moody*, or the Defendants, his assignees, in respect of such premises. And he found, that, according to the said laws, *Shute Barrington Moody*, before he became bankrupt, had not any power to sell the said premises discharged from the claims of his creditors, but that the Defendants, his assignees, had power to sell the said premises for the benefit of his creditors. And he found that such creditors had not, according to the said laws, any power to prevent such sale; and that none of such creditors had any right or interest in the proceeds of such sale other than as general creditors of *Shute Barrington Moody* under the fiat.

The Plaintiffs took exceptions to the report, on the

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Statement.

ground that the Master had not stated, as special circumstances, that as to the half lots 20 and 21, which were not conveyed to *Shute Barrington Moody* before his bankruptcy, the only mode by which a creditor of *Shute Barrington Moody* could have acquired a specific interest in those lots, would have been by a judgment against him (*Shute Barrington Moody*), and by taking in execution his equitable interest under the contract of the 14th of August, 1845; and also, that it would have been competent for *William Grant*, by the direction of *Shute Barrington Moody*, before his bankruptcy, to have made a transport of those lots to the Plaintiffs, subject to the right of the judge in the colony, before whom the transport would be passed, to object to the transport, on the ground that it was an evasion of such fiscal payments as would be due on an intermediate transport to *Shute Barrington Moody*, and subject also to the right of a creditor who had acquired a specific interest in those lots in manner aforesaid, to object to the transport as prejudicing such interest.

Argument.

Mr. Bacon and Mr. Cairns for the Plaintiffs in support of the exceptions.

Mr. Rolt and Mr. Lewin for the defendants, the assignees of the bankrupt.

Judgment.

VICE-CHANCELLOR:—

The Master in this case has found that the Plaintiffs acquired no lien on the premises comprised in the contract entered into by *Moody* before his bankruptcy; and that they became the absolute property of the assignees for the benefit of his creditors. It was not disputed, on the present argument, that, as to the lands actually conveyed by

*Grant to Moody* before his bankruptcy, the finding of the Master is right. Is there then any distinction in this respect between the property which was conveyed to *Moody*, and that as to which the conveyance had not been completed at the time of the bankruptcy. By the law of *Demerara*, as I collect it from the able opinions which have been taken, no debtor can alien immoveable property except by certain set forms, and with the express or tacit consent of his creditors. As soon as the whole of the purchase-money was paid to *Grant* by *Moody*, or by the Plaintiffs on his account, this property, though legally in *Grant*, was in fact the property of *Moody*; and the same forms would have to be gone through on a sale by him of the property, though it was not yet completely conveyed to him, as would have been necessary if it had been formally vested in him. There must have been an advertisement by *Grant* on the occasion of the alienation of the estate to *Moody*; and then *Moody's* creditors, or any one of them, would have had the power to intervene and prevent *Grant* from disposing of the estate in favour of any person but *Moody* or his assignees.

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 SPANSFIELD.  
 Judgment.

It was argued on the part of the Plaintiffs, that no creditor would have had the power to intervene, unless he had first proceeded to execution; but I do not understand that to be the result of the opinion which has been taken. Mr. *Downie*, in his second opinion on the case submitted to him, says, that, by the law of *Demerara*, a general creditor of *Moody* had a right or interest in the lots in question after the contract of the 14th of August, 1845, and before a transport of them to *Moody*; and that this was in the nature of a common law right or interest, and one which every creditor has in the property of his debtor. It is beyond all doubt, therefore, that the premises when vested in *Moody*, by virtue of the contract, became bound, although, owing to the transport not having been effected,

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the property remained in the hands of *Grant*. From the latter part of Mr. *Downie's* opinion, it appears that this right of a general creditor of *Moody* would extend also to prevent a transport from *Grant* being made to any other person than the assignees of *Moody* after his bankruptcy (a).

(a) The opinion of Mr. *Downie*, referred to above, was as follows:—"By the law of *Demerara*, a general creditor of *S. B. Moody* had a right or interest in the lots in question after the contract of the 14th of August, 1845, and before a transport of them to *Moody*. The nature thereof was a common law right or interest, and that which every creditor has in the property of his debtor. Until the payment of the purchase-money, the right or interest of the general creditor was subordinate to *Grant's* claim; but so soon as the payment of the purchase-money was made, the right and interest of the general creditor of *Moody* became absolute. In this case it became so by the payment to *Grant* by the plaintiffs on or about the 26th of October, 1846. Neither by that payment, nor by the indenture of the 10th of October, 1846, nor by any other of the circumstances stated in the case, nor by the whole of these matters combined, did the plaintiffs become clothed with or succeed to the rights which *Grant* held in the property up to the 26th of October, 1846. As stated in answer to the first query in the case, the plaintiffs became, by the payment of the purchase-money on behalf of *Moody* to *Grant*,

merely concurrent creditors of *Moody*, without any special lien on the property on account of which the payment was made. A general creditor of *Moody* could have asserted his right by taking the property in execution for his debt, and applying the proceeds to the payment of his claim,—a course which neither *Grant*, *Moody*, nor the plaintiffs, could legally have prevented. Although a general creditor of *Moody* could not, before *Moody's* bankruptcy, directly by any process known to the law of *Demerara*, have compelled *Grant* to give a transport to *Moody*; yet, by the proceeding in execution above mentioned, his right would be equally enforced, and the desired result obtained. With respect to the mode in which a general creditor of *Moody* could have prevented him from making a transport to any third party, and the principle of law on which it is founded, it is perhaps necessary to explain, that, by the law of *Demerara*, transports of immoveable property, being judicial acts, can be made only before a judge of the supreme court, after notice of an intended transport has been published four consecutive weeks in the official gazette of the colony. By the contract of the 14th of Au-



The necessary conclusion is, that this was the property of *Moody* in the hands of *Grant*, and the transport of which to any other party could be stayed at the instance of the creditors of *Moody*. When the law of a foreign country places a restraint upon the alienation of the property of a debtor situated in such country, an equity arising here on a contract entered into in respect of such property cannot be enforced against the *lex loci rei sitæ*. I do not see any substantial difference between the rights of the Plaintiffs upon the portions of the land actually conveyed at the time of the bankruptcy, and the lands which were then unconveyed. I am of opinion that the exception must be overruled. I think, however, that the justice of the case may be met by dismissing the claim without costs, and overruling the exceptions, with costs.

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gust, 1845, the lots in question became the property of *Moody*; and any creditor of *Moody* having, as already stated, acquired a right in that property, could, by entering on the records of the Court what is technically termed an opposition, prevent *Grant* from overleaping *Moody*, by giving a transport to a third party. Besides which, the Judge would not permit such a transport to be given in the face of the indenture of the 14th of August, 1845, not only because such a course would in itself be illegal, but also because it would be a fraud on the revenue, to which a portion of the fees charged on the passing of transports is payable. The right of a general creditor of *Moody* would, therefore, extend also to prevent a transport from *Grant* being made to any other

persons than the assignees of *Moody* after his bankruptcy; the assignees being the representatives of *Moody* as well as trustees for his creditors, a transport from *Grant* to them was compulsory on *Grant*. It may not be irrelevant to state, that, by the law of *Demerara*, a mortgage, being also a judicial act, can be passed only before a judge, after notice, as in the case of a transport. The indenture of the 10th of October, 1846, is, by that law, merely an agreement to mortgage, and is of no force as an actual mortgage or conveyance."

For a discussion of another question relating to the effect of the law of real property in *Demerara*, with reference to transactions taking place in this country, see *Bentinck v. Willink*, 2 Hare, 1, 8, 12.

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Nov. 19th.

ESPEY v. LAKE.

Where a promissory note appeared to have been signed by a lady, in her twenty-second year, as surety for her step-father, in whose house she had been residing with her mother for many years previously, the Court restrained execution against her on a judgment obtained by the payee.

The Court will not refuse relief to a Plaintiff, merely on the ground that he has super-added to the circumstances of the case, which would entitle him to relief, allegations of fraud which are not established.

A MOTION to restrain proceedings in an action upon a promissory note for 500*l.*, which the Plaintiff had, in the year 1842, joined in making, with one *Speakman*, as his surety, for that sum and interest, to the Defendant *Lake*. The case made on the bill and affidavits was, that the mother of the Plaintiff had married *Speakman*, and that the Plaintiff had lived with her mother and step-father from infancy: that she attained twenty-one in the year 1841, and that her signature was obtained to the note in question in the following year, she being then under the influence of *Speakman*, her step-father; that the Plaintiff had received no consideration for the note; and that she made it solely on the representations of her mother and *Speakman*. The bill and affidavits also alleged that *Speakman*, being in want of money, had borrowed the 500*l.* of *Lake*, who was his brother-in-law, upon the terms of paying 10*l.* per cent. interest for the first five years, which was to be secured by the promissory note of *Speakman* for 250*l.*, the repayment of the whole 500*l.*, and interest at 5*l.* per cent., being secured by the joint and several promissory note of *Speakman* and the Plaintiff, payable on demand. The Plaintiff alleged that she was wholly ignorant of the arrangement for not requiring payment for five years, and for the payment of 10*l.* per cent. during that time; that for several years after the making of the note *Speakman* was well able to pay the 500*l.*; that he had paid the 250*l.*, and had now become in embarrassed circumstances. The bill averred, that the Plaintiff had been constantly in the habit of meeting *Lake*, but had been kept wholly ignorant of the money being still unpaid.

It appeared that interest on the note had been paid up

to 1851. The action was brought by *Lake* against the Plaintiff in March, 1852; and in August he obtained a verdict.

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*Mr. Rolt* and *Mr. Elderton*, for the motion, contended that the Court would not permit the defendant to enforce a security, obtained without consideration by the step-father of the Plaintiff, and under the exercise of an influence which he had acquired from having been for many years in loco parentis to her. They contended, also, that another ground for discharging the Plaintiff from her obligation under the note was created by the concealed bargain for securing the payment of 10*l.* per cent. interest to the creditor by the principal debtor, and which, they argued, had the effect of releasing the surety. They cited the case of *Archer v. Hudson* (a) in support of both points of the argument; and, on the first point,—the equitable question, whether the security was vitiated on the ground of the influence under which it was given, *Maitland v. Backhouse* (b). On the second point, that the concealment from the surety of the agreement of the principal debtor to pay 10*l.* per cent. interest, rendered the note void as against the Plaintiff: *Stone v. Compton* (c), *Pidcock v. Bishop* (d), and *Owen v. Homan* (e).

*Mr. Daniel* and *Mr. C. M. Roupell*, for the Defendant, argued that the case raised by the bill would, if proved, have been a defence at law, and did not entitle the Plaintiff to come to this Court. That the agreement as to the payment of 10*l.* per cent. interest was not a fact prejudicial to or in any way affecting the surety. That the Plaintiff had formed a member of the family of the principal debtor, and participated in the advantages of the loan ever

(a) 7 Beav. 551.

(b) 16 Sim. 58.

(c) 5 Bing. 142.

(d) 3 B. & C. 605.

(e) 3 Mac. & G. 378.

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since it had been made. That the point of influence was an after-thought, not put in issue by the pleadings; and that the bill contained charges of personal fraud on the part of the Defendant, which had totally failed in proof; and where such was the case, the Court would refuse relief on that ground, even if there were otherwise a case: *Wilde v. Gibson* (a).

*Judgment.* VICE-CHANCELLOR :—

This is an application to restrain the Defendant from entering up judgment upon the verdict which he has obtained at law, and to stay execution.

I take it to be quite clear, that the principles of this Court go to this extent,—that, in the case of a security taken from a person just of age, living under the influence and in the house of another person, with a relationship subsisting between such other person and the person from whom the security is taken, which constitutes anything in the nature of a trust, or anything approaching to the relation of guardian and ward or of standing in loco parentis to the surety, this Court will not allow such security to be enforced against the person from whom it is taken, unless the Court shall be perfectly satisfied that the security was given freely and voluntarily, and without any influence having been exercised by the party in whose favour the security is made, or by the party who was the medium or instrument of obtaining it. This being the principle, let us see how far the circumstances of this case come within it.

In this case the Plaintiff attained the age of twenty-one in the month of December, 1841. She was then living in

(a) 1 H. L. Cas. 605.

the house of her step-father Mr. *Speakman*, and with her mother Mrs. *Speakman*. At the end of the year 1842 her step-father proposes to borrow 500*l.* from *Lake*. I do not enter into the particular terms proposed. It is said that he proposed to pay 10*l.* per cent. for five years, and 5*l.* per cent. afterwards; but the fact is undoubted, the loan was to be a loan by *Lake* to *Speakman*, the step-father of the young lady. Now, what next took place? I take the circumstances from *Lake's* own affidavit in reply in this case. *Lake* says, "I asked for security, and he (*Speakman*) said he had no security to offer but that of his step-daughter, meaning Miss *Espey*." It is clear, therefore, that *Lake* knew that the only security he could have was that of the Plaintiff, the step-daughter of *Speakman*, who was at the time living in the house with her step-father, and under his influence. *Lake*, knowing these circumstances, nevertheless took the joint and several promissory note of *Speakman* and the Plaintiff, dated the 1st of January, 1843, for securing the 500*l.*

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It is said by *Lake* that he took no part in the transaction, and that he left it entirely to *Speakman*. I impute no moral fraud to *Lake* in the course of the transaction. I do not believe that there was any moral fraud on his part, nor might he have been aware of the principles which guide the Court with regard to securities taken from a person in the situation of Miss *Espey* at that time. But what does the Defendant say? Why, that he left it wholly to *Speakman*. That is, he himself allowed a party standing in the relation of guardian to this young lady to persuade her to join in this security for a sum of 500*l.* In the application of the principles of the Court, I see no distinction between the case of one who himself exercises a direct influence, or of another who makes himself a party with the guardian who obtains such a security from his ward. The Defendant *Lake* left it to *Speakman*, who had influence over

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his young ward, as she may be called, to induce her to join in the security, thereby placing her more directly under undue influence than if he had applied for the security himself. Such a security cannot be maintained consistently with the principles of this Court.

It is said, that this was a matter which is not put in issue by the bill. Perhaps the bill might have brought the case forward more distinctly; but in my opinion the bill sufficiently raises it. The bill alleges, that, at the time *Lake* agreed to lend the 500*l.*, it was well known to him that the Plaintiff had no property except a sum of 500*l.*; that she was applied to to join *Speakman* in a promissory note for 500*l.*; and that she did so on the representation that she would never be called upon to pay the note, and influenced by the representations of her mother and Mr. *Speakman*, but, as was well known to *Lake*, without receiving any consideration. The bill subsequently alleges, that this young lady had resided in the house of *Speakman* and his wife for fourteen years previously. These facts are enough to raise the equities upon which this motion was argued in the opening.

It is said, that there are other circumstances alleged in the bill which rest the equity, not on the law of the case, as applied to the circumstances to which I have referred, but on a case of personal fraud; and that, no personal fraud being proved, this is brought within the principle laid down by Lord *Cottenham* in *Wilde v. Gibson* (a), and that the Court ought not to give any relief. Lord *Cottenham*, if I recollect rightly, qualified that principle in subsequent cases. It is not, as I take it, the law of this Court, that, because there are allegations of fraud superadded upon circumstances which of themselves would give the plaintiff an equity, that the equity arising from these cir-

(a) 1 H. L. Cas. 605.

cumstances is to be disregarded by the Court. With that qualification, I fully agree with the dictum in *Wilde v. Gibson*.

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In the present case there is nothing which would take the case out of *Archer v. Hudson*, and the subsequent case of *Maitland v. Backhouse*, except the time which has elapsed. The question has been discussed, whether there are circumstances in the case before me which would destroy the original equity. I see no such circumstances arising out of the lapse of time. It was suggested that the lady had been participating in the profits of the business since the transaction—a business carried on with this borrowed capital. If there be any facts of that kind, the Defendant may allege them in his answer, and avail himself of them, when they are proved, at the hearing of the cause; but I must deal with this injunction upon the evidence before me, and in that I see nothing which deprives the Plaintiff of the equity to which the circumstances entitle her. I think there is sufficient to authorise me to restrain execution upon the judgment at law.

Another question which was raised in this case I do not think it necessary to give an opinion upon. It is a question of considerable importance, namely, to what extent a creditor is bound to communicate to the surety the whole nature of any arrangements which may have been entered into between the creditor and the principal debtor, when all those facts do not appear on the instrument constituting the suretyship. The point is too important to be disposed of without looking more fully into the case. It is not necessary on this occasion to decide it.

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Mr. *Rolt* submitted that the order should stay the Plaintiff from entering up judgment.

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I do not allow the Plaintiff to get the fruits of the judgment; but I think the Defendant has acquired a legal right to enter up judgment. Upon what I may call the pure equity of this case, there is not, I think, sufficient ground for granting the injunction further than to stay execution, without putting the Plaintiff to the terms of paying the money into Court.

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Dec. 6th, 7th,  
& 10th.

FITZWILLIAMS v. KELLY.

The lessee for years of tenements, part of a manor held under a lease from tenants of the manor, who were trustees of a charity, by which the lessee had covenanted to pay the fines and expenses which should be incurred from time to time during the term, in filling up the number of trustees when reduced to five, with a proviso for re-entry by

the lessors in case the fines should not be paid by the lessee. The lessee devised the leasehold estate and other leasehold property, and shares, stocks, funds, and securities, and all other her personal estate to trustees for her two nieces, for their lives, with remainder to their respective children, and remainders over. The number of trustees became reduced to five shortly before the death of the lessee, and became again reduced to five some years afterwards. Litigation with the lord of the manor commenced in the life of the lessee, and was continued after her decease as to the amount of the fines: the dispute was ultimately compromised by the payment of a sum by the devisee of the leasehold estate, in respect of each renewal and of certain costs:—*Held*, that the fine payable in respect of the admission of the trustees, which became necessary in the life of the testatrix, to fill up the number, and the costs of the litigation in respect of such fine, were payable out of the general personal estate of the testatrix, exclusive of the leaseholds; and that the fine which became payable for filling up the number of trustees when it became necessary to do so, after the death of the testatrix, were payable by the devisees of the particular leasehold estate, and not by the general personal estate.

BY a lease, dated the 13th of December, 1811, the trustees of a charity estate at *Hampstead*, being copyhold and held of the manor of *Hampstead*, by virtue of a license, and in pursuance of a covenant for renewal contained in a former lease, demised a portion of the estate to *Ann Buckner*, her executors, administrators, and assigns, for twenty-one years, from Lady-day, 1810, at the yearly rent of 70*l.* and subject, amongst other covenants, to a covenant by *Ann Buckner*, that she, her executors, &c., would from time to time, during the term of twenty-one years thereby granted, and also during the further term of nineteen years thereby covenanted to be granted (to make the term of twenty-one years already granted, and a term



of twenty-one years thereby granted, a term of sixty-one years from Lady-day, 1789), when and as often as the present or any future trustees of the charity estate should, by death or resignation, be reduced to the number of five, or any other person or persons should be nominated and appointed a new trustee or new trustees of the estate for the benefit of the charity, and such new trustee or trustees should be admitted tenants to the premises thereby demised, well and truly pay or cause to be paid to the lord for the time being of the manor of *Hampstead*, and his steward, all and every sum and sums of money whatsoever, which should become due or be demanded for or in respect of any fine or fines, fees, or otherwise to accrue or become payable upon or by reason or means of any and every such admission or admissions, or otherwise, respecting the same,—the trustees of the charity estate, from time to time, as often as the same should happen, contributing towards such fines and fees the sum of 70*l.*, being one year's rent of the premises thereby reserved, and no more; and in the same indenture there was a covenant by the trustees, that they, or the trustees for the time being, would from time to time, upon the request and at the costs and charges of *Ann Buckner*, her executors, &c., apply for and obtain a license or licenses from the lord for the time being of the manor of *Hampstead*, for letting and demising all and singular the premises thereby demised, for such further term or terms of years as should be requisite to make up the said term of sixty-one years from Lady-day, 1789; and would from time to time thereupon make and execute unto *Ann Buckner*, her executors, &c., a good and effectual lease or good and effectual leases of the premises thereby demised, for such further term or terms of years as should make up a full term of sixty-one years computed as aforesaid, subject to and at and under the same yearly rent, and to the same covenants, &c., as were therein contained on the part of *Ann Buckner*,

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her executors, &c., other than the covenant for renewal of the lease for any term beyond the said term of sixty-one years; and further, that the trustees for the time being of the charity would, when and as often as any fine or fines should become due and be paid by *Ann Buckner*, her executors, &c., on the admission or admissions of any new trustees of the charity to the estate thereby demised, pay or allow *Ann Buckner*, her executors, &c., to retain the said sum of 70*l.* out of the first rent which should thereafter become due towards the fines and fees which should have been so paid by *Ann Buckner*, her executors, &c.

In July, 1825, the number of trustees became reduced to five, and in July, 1826, it was made up to fourteen, who were admitted tenants of the manor.

*Ann Buckner*, by her will, dated in January, 1823, after devising her freehold and copyhold estates to trustees in moieties for the use of her great nieces, *Elizabeth Kelly* (then *Elizabeth Jenkin*) and *Anna Maria Jenkin*, for their respective lives, with remainder to their respective issue in tail,—devised all and singular the leasehold messuages, farms, lands, tenements, and hereditaments situate at *Hampstead*, in *Union-street*, *St. Marylebone*, and in *Sloane-street*, *Chelsea*, or elsewhere in the county of *Middlesex*, or in any other county or place whatsoever, of or to which she or any person or persons in trust for her should or might, at the time of her decease, be possessed or entitled for any term or terms of years in possession, reversion, remainder, or expectancy; and also all her share in the *Chelsea* waterworks; and also her stocks, funds, and securities for money, and all other her personal estate and effects whatsoever, of or to which she, or any person or persons in trust for her, should, at the time of her decease, be possessed or entitled, unto trustees, their executors, &c., upon trust, to pay the annual produce of one moiety

to *Elisabeth Kelly* for her life, for her separate use, without power of anticipation, and after her decease upon trust for her children equally; with remainder, in case there should be no such issue as therein mentioned, in trust for *Anna Maria Jenkin* for her life, with similar provisions for her children; and, as to the other moiety, upon the like trusts for *Anna Maria Jenkin* and her children as were therein-before declared of the first moiety; with remainder, if there should be no such children, on the like trusts for *Elisabeth Kelly* and her children; with an ultimate remainder as to both moieties, as the survivor of her said great nieces (if there should be no such children of either) should appoint; and, in default of appointment, for the executors, &c. of such survivor.

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*Ann Buckner* died on the 24th of September, 1826.

The term of twenty-one years granted by the lease of 1811 expired in March, 1831. No renewal was made; but if a renewed lease for nineteen years had been granted, it would have expired in March, 1850.

In March, 1850, the number of the charity trustees became again reduced to five, and was again raised to fourteen, who were admitted tenants of the copyhold estate by the lord of the manor on the 25th of March, 1850.

*Anna Maria Jenkin* died on the 25th of March, 1850, unmarried, and by her will appointed *Fitzwilliams* and another her executors.

Suits at law and in equity were instituted in the lifetime of the testatrix *Ann Buckner*, and continued after her decease, on the subject of the amount of the fine payable to the lord of the manor, on filling up the number of trustees in 1826; and ultimately a compromise was effect-

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ed under the sanction of the Court, and an order was made, whereby it was ordered, that, on payment by *A. P. Kelly* and *Elisabeth* his wife, to *Sir T. M. Wilson* (the lord of the manor), for the fine on the admission of the trustees to the charity estates in 1826, of 2000*l.*, and of interest thereon at 4*l.* per cent. since the date of the judgment in June, 1839, therein mentioned, deducting the income-tax and *Sir T. M. Wilson's* taxed costs at law amounting to 150*l.*, *Sir T. M. Wilson* should enter up satisfaction on the said judgment; and that, on further payment by *A. P. Kelly* and *Elisabeth* his wife to *Sir T. M. Wilson* of 2000*l.* for the fine on the admission of trustees of the charity estates in 1850, and on the payment by them to him of the quit rents for the same estates in arrear to Lady-day, 1850, and of the steward's bill in respect of the surrender and admission in 1826 remaining unpaid, and also his bills in respect of the appointment of new trustees, and of the surrender and admission in 1850, all further proceedings should be stayed in the cause as between the informants and Plaintiffs and *Sir T. M. Wilson*. And it was ordered, that, on payment by *A. P. Kelly* and *Elisabeth* his wife to *Sir T. M. Wilson* the elder and *T. M. Wilson* the younger, of their costs in the amended information and bill, all further proceedings as between the informant and Plaintiffs and the said Defendants should also be stayed. And it was ordered, that *A. P. Kelly* and *Elisabeth* his wife should make such several payments accordingly; but the order was to relate only to bygone fines, and was to be without prejudice to any question between the parties as therein mentioned. And it was ordered, that *A. P. Kelly* and *Elisabeth* his wife should pay the costs of all proper parties, except the Defendant *Sir T. M. Wilson*, of that application.

Under these circumstances, the special case was framed in which the executors of *Anna Maria Jenkin* were Plain-

tiffs, and Mrs. *Kelly* and her husband and children were Defendants, to determine the following questions:—Whether, under the will and codicils of *Ann Buckner*, the leasehold property, the shares in the *Chelsea* waterworks, and the *Reigate* turnpike bonds, comprised in the will, or any and which of them, ought to have been enjoyed by the successive legatees thereof in specie, for any and what period; and whether they ought, at any and what time, to have been sold or otherwise converted into money, and the proceeds to have been invested on permanent securities, upon trust for the successive legatees thereof, or to have been considered and treated as sold and converted? By whom, out of what funds, and in what proportion and manner the costs of the quit rents, principal, and interest of the first fine, payable in July, 1826, the steward's fees, and costs of the litigation; and the quit rents and fine, and steward's fees, and other expenses, which became payable in March, 1850, ought to be borne and paid? In what way, as between the tenants for life and those interested in remainder or otherwise, ought the funds accumulated from the rents of the *Hampstead* leaseholds to be dealt with? And, the tenants for life having received the whole interest and income of that which was in any view the capital of the residuary estate, any and what amount ought to be repaid, and treated as forming part of such last-mentioned capital?

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Mr. *Rolt* and Mr. *Lewin* for the Plaintiffs.

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Mr. *Baily* and Mr. *Giffard* for the Defendants the children of Mr. and Mrs. *Kelly*.

Mr. *Pownall*, for the Defendants Mr. and Mrs. *Kelly*, took no part in the argument.

On the question whether the leaseholds were specifically

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given, or were comprised in the residuary bequest, they cited *Taylor v. Taylor* (a), *Mills v. Mills* (b), *Howe v. Lord Dartmouth* (c), *Pickering v. Pickering* (d). In support of the argument, that the general personal estate, and not the leaseholds specifically, ought to bear the expense of the new admissions of trustees, *Blount v. Hipkins* (e); that the charges should be borne by the leaseholds specifically, *Jacques v. Chambers* (f) and *Hickling v. Boyer* (g). On the respective proportions in which the charges in respect of filling up the number of trustees should be borne by the tenant for life and parties interested in remainder in the leasehold and general personal estate, *Jones v. Jones* (h).

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All the questions in this case reduce themselves ultimately to these two—first, how certain sums of money, payable under covenants in the lease held by the testatrix, ought to be borne as between her general residue and the leasehold estate; and secondly, how the costs of the litigation, which took place in determining the amount to be paid in respect of the fine, are to be borne as between the same funds.

In considering these questions, it is to be observed in the outset, that there is an express covenant by the lessee to pay the fines as mentioned in the lease, when the trustees are reduced to five in number; and that it is admitted that the *Chelsea* waterworks shares are in the nature of real estate.

- (a) 6 Sim. 246.
- (b) 7 Sim. 501.
- (c) 7 Ves. 147.
- (d) 2 Beav. 31.

- (e) 7 Sim. 51.
- (f) 2 Coll. 435.
- (g) 3 Mac. & G. 635.
- (h) 5 Hare, 440.

The number of trustees having become reduced to five in the lifetime of the testatrix, one fine became payable during her life. The first question is, whether the covenant as to that fine is or is not to be exclusively satisfied out of the leasehold estate. I am of opinion that it is not. It was a debt contracted by the testatrix for the benefit of the leasehold estate. It was a debt which became due in her lifetime, and for which she might have been sued, and, if sued, would have been compelled to pay. There is no warrant for the proposition, that the devisee of the leasehold estates is to take them subject to liabilities which had already ripened into debts in the lifetime of the testatrix. The debt being due by the testatrix at the time of her decease, it might have been properly paid by her representatives out of her general personal estate, and it is still payable out of that estate.

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In the case of *Barry v. Harding (a)*, which was not cited in argument, the testator, on a purchase of lands which were at the time subject to a mortgage term, agreed with the mortgagor to pay the mortgage debt; and in consideration of this undertaking, and of a sum of money paid and an annuity agreed to be paid, the mortgagor and mortgagee conveyed the mortgaged estate to the testator: and Sir *Edward Sugden*, held, that the devisee of the lands was not entitled to have the mortgage debt (which was not paid off by the testator in his lifetime) satisfied out of his general personal estate. "It cannot," the Lord Chancellor there observed, "be said, that the testator had any intention with respect to this matter, for by his will he has not made any provision for the payment of his debts." "I am not aware that there is any distinction in this respect between debts due by a testator and charged upon his lands, and those which are not so charged, but are payable

(a) 1 J. & L. 475.

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out of his general personal estate only. The arrears of head rent constitute a debt due by the testator at his decease; and therefore fall within the general rule applicable to the administration of assets. It has been held, that, where property is given to a man in respect of which future payments were to be made, the devisee did not take it cum onere; but the future payments were to be made out of the general personal estate of the testator" (referring in the note to *Blount v. Hipkins* (a)). "That doctrine may perhaps have been carried too far; but it shews to what an extent the law upon this subject has gone. I never before heard it contended, that the devisee of a leasehold interest took the estate subject to all the arrears of head rent which might be due in respect of it at the decease of the testator" (b).

The second question is, whether the leasehold estate ought to bear its share of the burthen; whether the fine, if not wholly to be paid out of the leasehold estate to which it relates, ought to be charged on that estate pro ratâ with the general personal estate. In answering this question, the first consideration is, whether, upon the construction of this will, the testatrix must be taken to have intended that her leasehold estates should be exempted from the payment of her debts, and that her debts should be discharged out of her general personal estate, not including the leaseholds. In some cases where there has been an enumeration of items coupled with a gift of the general personal estate, the particular items have been held not to be included in the general personal estate, but to be disposed of specifically. All these cases depend on the construction of the particular will in which the gift is found. Looking through this will carefully, not merely at the particular provisions, but so as to discover, if possible, the whole intention of the testatrix, I find enough to satisfy

(a) 7 Sim. 43.

(b) 1 J. & L. 490.



me that the testatrix has drawn a distinction between the general residue and the particular articles enumerated. The bequest of all and singular her leasehold estates, and of her shares in the *Chelsea* Waterworks, entitle the devisees to distinguish between the leaseholds and shares, and the general residue of the personal estate. That the testatrix intended the bequest to be specific, is rendered more clear by the power of leasing in the will, which I think extends to the leasehold as well as the copyhold estate, but could not apply to the general personal estate. The power given to the trustees in the second codicil, to vary the securities on which the property of the testatrix might be invested, and to invest the proceeds to arise from the sale of the said stocks, funds, and securities in the purchase of such hereditaments as therein mentioned, also shews, that the testatrix distinguished between her stocks, funds, and securities, and her leasehold estate. There is also in the last codicil a power to cut and dispose of timber, and to lay out and invest the money to arise by such sale in the purchase of stock in the public funds or on real securities in their own names, and stand possessed of the said stocks, funds, and securities, upon the same trusts as were in her will declared of the residue of her personal estate and effects. I think there is enough to shew, that the testatrix intended the leaseholds and the *Chelsea* Waterworks shares to be enjoyed specifically; and although there is not any actual specific bequest of that property, yet as between the leaseholds and the general residue of her estate, the general personal estate is to be the fund out of which, I think, these liabilities are to be discharged, without including therein the leasehold property. The same reasoning will determine also the question as to the costs of the litigation respecting the fine, which must be borne out of the same estate.

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Another and a more difficult question is as to the se-

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cond fine of 2000*l.*, which became payable in consequence of the trustees having, shortly before the death of *Anna Maria Jenkin*, become a second time reduced to five in number. How is this sum of 2000*l.* to be borne as between the leasehold estate and the general residue of the personal estate? The second fine does not stand on the same footing as the first. It was not a debt due at the decease of the testatrix, but a mere liability entered into by her in respect of her leasehold property, with which neither the testatrix nor the estate might ever become actually chargeable. Now, what is the nature of the liability into which she thus entered.. There is, as was admitted, a provision of re-entry by the lessors, in case the testatrix did not perform the covenants of the lease. The testatrix, therefore, had an estate defeasible in case of nonperformance of the covenants contained in the lease, and what she gave by her will was the same thing,—a lease subject to be defeated by the nonperformance of the covenants which it contained. I do not know how I can hold that the devisee of an estate liable to be defeated has a right, against the general estate of his devisor, to have that defeasible estate turned into an indefeasible one, or to be indemnified against the consequences of his own neglect in suffering it to be defeated. The payment of this fine is an element necessarily incident to the preservation of the lease, and the person taking the benefit of the lease must take its burdens also. If the covenants be not performed, the lessor may re-enter, and the devisee must take the estate subject to that power in the lessor so to determine it. He cannot require that the personal estate of the testatrix shall be applied to put him in a better position than he was in at the time of the death of the testatrix. Suppose the case of a lease at a yearly rent with a covenant to pay a certain sum at the expiration of five years from the date of the lease, and a proviso for re-entry if it should not be paid, a legatee of the lease could not compel the executor to pay the sum at the expiration

of the five years out of the general personal estate. In *Blount v. Hipkins* (a), on a bequest of personal estate exonerated from the payment of debts, which were charged on certain real estates, the legatee of shares in the *Birmingham* Railway Company, which were personal estate, was held to be entitled to have future calls on the shares paid out of the real estates: that being a gift of personal estate discharged from the payment of debts, the future calls which the testator had covenanted to pay were considered to be debts of the testator payable in futuro, but in the same way as his other debts. That case does not seem to me to militate against the opinion which I have formed, that, in the case before me, the leasehold estate must carry this burthen with it. But there is another case very nearly resembling the present, which was not cited, and which has embarrassed me considerably. I allude to the case of *Marshall v. Holloway* (b). In that case, as stated in the marginal note, A., having a leasehold estate on which he had covenanted to erect certain buildings within a specified time, bequeathed it, and also his general personal estate, subject as to the latter to the payment of his debts, to trustees for B. for life, with several limitations over. A. died before the time expired, leaving the covenant unperformed in part; and it was held that his general personal estate was liable to the performance of the covenant. The bequest there was of all messuages, houses, buildings, lands, tenements, and hereditaments, as well freehold as copyhold, or customary and leasehold, and also all monies, debts, sums of money, stocks and annuities in the public funds, to him due, owing, and belonging, and all other his real and personal estate, upon trust to sell and convert into money such part of his personal estate as should not consist of monies or stock, and to collect all debts due to him, and thereout to pay his just debts, &c. This seems at first sight an ex-

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(a) 7 Sim. 43.

(b) 5 Sim. 196.

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*Judgment.*

tremely strong case. The executors and trustees of the testator had borrowed monies and applied the personal estate which they had received in building on the leasehold estate; but it is stated in the Master's report, that the monies were laid out to prevent the liability to penalties and forfeiture for breaches of covenants in the lease. In that case, as in this, the lease contained clauses making it determinable on nonperformance of the covenants. The decision appears to me to rest on the same ground as that of *Blount v. Hipkins*. The Vice-Chancellor considered that there was an express intention to discharge all debts out of the general personal estate; the devise being of all the real, leasehold, and personal estate, upon trust to get in the personal estate, and thereout to pay the debts. The testatrix in the case before me might no doubt have said: "I intend this covenant to be discharged out of my general personal estate." The question for the Court is, whether she has said so. That it was the clause which directed the debts to be paid out of the personal estate in the case of *Marshall v. Holloway*, which governed the decision of the Vice-Chancellor, is, I think, apparent; for he observed, that "it was idle to talk of persons beneficially interested in the personal estate, until it was ascertained whether there would be any residue; and especially in this case, where the fund which was to be laid out upon the trusts of the will was the clear surplus monies arising from the testator's personal estate after payment of his debts" (a). That case, therefore, went on the particular provisions in the will, and not on any general rule of law. The Vice-Chancellor considered that what was given to the legatee was the whole leasehold estate, and that the charges upon it fell to be paid out of the general personal estate. In this case the gift is not of the whole leasehold estate, but of the leasehold estate subject to liability.

(a) 5 Sim. 203.

The cases of *Jacques v. Chambers* and *Barry v. Harding* sufficiently warrant the opinion to which I should have come independently of authority, that the latter fine of 2000*l.* is to be borne wholly by the leaseholds themselves, and not out of the general personal estate. The tenants for life will have to keep down the interest. The costs of this case will also come out of the general personal estate, inasmuch as they have been occasioned by a difficulty arising out of the will itself.

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*Judgment.*

## MORGAN v. MILMAN.

July 24th;  
Aug. 2nd.

By a settlement, dated in November, 1844, made between the late Sir *Charles Morgan* and the plaintiff, his son, (now Sir *Charles Morgan*), of the first part; the Defendants, the trustees, of the second part; and other trustees of a term of 500 years thereby created in the estate, of the third part; the estates therein comprised, including the lands which were the subject of this suit, were conveyed to the defendants, the trustees, and their heirs, to such uses and upon and for such trusts as the late Sir *Charles*

Estates were settled to the use of trustees, upon such trusts as *A.* and *B.* should jointly appoint, and subject thereto to the use of *A.* for life, with remainder to *B.* for life, remainder to the first and other sons of *B.* in tail, with a power in the trustee

with the consent of *A.*, or the first person entitled to an estate of freehold in the premises, to agree with any Railway &c. Company for the purchase-money and compensation in respect of any portion of the estate, and that their receipt should be a sufficient discharge; and to receive the monies to the same uses as the settled estates. A Railway Company gave notice of taking a portion of the lands under their powers, and a negotiation took place as to the price: the Company, requiring immediate possession, deposited 8000*l.* in a bank as security for and until payment of the sum which should be awarded or agreed upon. The Company subsequently gave a further notice to take another portion of the same estates; and a sum of money was paid by the Company to *A.* and *B.* upon their joint receipt, in which it was expressed to be paid on account of the compensation money to be ultimately fixed, and to be paid by the Company in respect of the said estates. Before the amount of the price and compensation was fixed, *A.* died. On a bill by *B.* as executor of *A.* against the trustees and the Company, to enforce the sale as upon a binding contract, and obtain payment of the purchase-money (*B.* waiving any claim thereto in his own right), the Court held that there was no contract for the sale of the lands to the Company, binding by its own force on the donee of the power, and that the remainder-man could not be affected by the conduct of the donee of the power, and that, inasmuch as there was not, during the life of *A.*, any contract for the sale of such lands binding on *A.* and *B.*, independently of the possession by the Company, there was, therefore, no contract which could be enforced against the remainderman.

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*Morgan* and the Plaintiff should jointly appoint, and subject thereto to the said trustees for a term of 500 years, and subject to such term to the use of the late Sir *Charles Morgan* for life, remainder to the Plaintiff for life, with remainder to the first, second, and other sons of the Plaintiff successively in tail in strict settlement. The settlement provided, that it should be lawful for the Defendants, the trustees, with the consent of Sir *Charles Morgan*, or other the person who should for the time being be entitled to the first estate of freehold in the hereditaments thereby limited, to agree with any canal, railway, or other company, or projected company as to the amount of consideration to be paid for or in respect of any of the hereditaments thereby settled, which such company should require, and as to any compensation for severance of lands, and for any injury or damage to the said estates, and generally to agree to all such provisions as should be considered necessary for the protection of the said estates in consequence of the works of any such company or the proceedings thereof; and that their receipt or receipts should be a sufficient discharge for all monies payable in consequence of the arrangements made with such companies as aforesaid. The settlement also contained the usual power of sale and exchange, and provided that the monies to arise from such sale, and the purchase monies of lands to be taken by any such companies under the above power, were to be held for the same uses as the settled estates. In December, 1845, the *South Wales* Railway Company, under the powers of their Acts, which incorporated the Lands and Railways Clauses Consolidation Acts, were about to pass through the estates; and the late Sir *Charles Morgan* authorised his solicitor, Mr. *Burley*, to negotiate with the Company for any part of the settled lands which they might require. In March, 1846, the Company gave the usual notices to take part of these lands; and Mr. *Woolley*, a surveyor, valued the part proposed to be taken at 8000*l*.

The Company did not agree to this, but offered 7,500*l*. Pending this valuation, and on the 16th of April, 1846, Sir *Charles Morgan's* solicitor wrote to the solicitor of the Company on the subject of the title of Sir *Charles Morgan*, and the title which the Company would require, stating in his letter the joint power of appointment contained in the settlement of November, 1844, and the limitations of that deed, adding, that the estates in *Monmouth* and *Glamorgan*, above the family and other charges, were of great value, and expressing his hope that there would be no objection to Sir *Charles Morgan* and the Plaintiff receiving the purchase-money without procuring the consent of any mortgagee thereto. The Company required immediate possession of the land, and therefore agreed to deposit in the bank of Messrs. *Glyn & Co.* the 8000*l*. The agreement was dated the 30th of July, 1846, and was signed by the solicitor of Sir *Charles Morgan*, on his part, and by the secretary of the Company on their behalf, and was in the following words: "Sir *Charles Morgan*, Bart., and the *South Wales* Railway Company. Memorandum.—The amount claimed by Sir *Charles Morgan* (8000*l*.) for and in respect of the twenty-six acres of land required by the Company in the parishes of *Christ-Church*, *St. Woollos*, *Bassaleg*, and *St. Bride's*, in the county of *Monmouth*, to be deposited in Messrs. *Glyn's* bank, in the joint names of *J. Burley*, Esq., and *C. Russell*, Esq., as security for and until the payment by the Company of the sum which shall be awarded or agreed upon. On this deposit being made, possession to be given to the Company of the land, the Company paying interest at the rate of 4*l*. per cent. on the sum to be so awarded or agreed upon from the time of such possession. The Company within one month from such possession to proceed without any delay to get the amount of compensation settled either by arbitration or a jury, as Sir *Charles Morgan* shall choose."

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*Statement.*

In August, 1846, the Company gave a further notice of their intention to take other portions of the settled estates. A part of the lands so proposed to be taken were valued by Mr. Woolley at a sum of 7500*l.*, making, together with the sum claimed for the first portion of the lands, the sum of 15,500*l.* The Company offered 14,000*l.* for the land included in both valuations. The remainder of the lands comprised in the second notice was also valued by Mr. Woolley at 1250*l.*, or 1100*l.*, and a road to be made and left as specified in his valuation. On the 24th of September, 1846, Sir Charles Morgan's solicitor applied to the Company for payment to Sir Charles Morgan of the 8000*l.* which had been deposited, adding, "the sum claimed for the other lands will be deposited by the directors in the usual way, after which the total amount of compensation can be decided upon by reference or a jury." To this letter the secretary of the Company replied, that it would be better to let the 8000*l.*, already deposited, stand as it was; but that, on any day after the ensuing Monday (28th of September), if the solicitor of Sir Charles Morgan would bring a receipt from Sir Charles Morgan and Mr. Morgan for 7500*l.*, the balance of the 15,500*l.* claimed by Sir Charles, a cheque should be given for the amount, on account of the whole payment to be made for Sir Charles' land, as should be thereafter determined. On the 30th of September, 1846, a receipt was accordingly signed by the late Sir Charles Morgan and the Plaintiff, as follows:—"September 30th, 1846. Received this day of the South Wales Railway Company the sum of 7500*l.*, on account of the compensation money to be ultimately fixed, and to be paid by the said Company in respect of the lands, part of our estates, required for the South Wales Railway Company." The 7500*l.* was thereupon paid to the account of the late Sir Charles Morgan with Messrs. Coutts. Abstracts of the title to the lands, which were the subject of these negotiations (and which lands were described in the first three



parts of the schedule to the bill), were delivered; but on the 5th of December, 1846, and before any other steps were taken with reference to the contract, Sir *Charles Morgan* died.

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After the death of Sir *Charles Morgan*, the Company gave notice of their intention to take other lands which were comprised in the settlement, and which were described in the fourth part of the schedule to the bill. The Company agreed to pay 20,000*l.* for the whole of the settled lands which they required. The sum of 4000*l.*, part of the 8000*l.*, was paid over to the trustees, such sum of 4000*l.* being less than the value of the lands, as to which the notices were not given until after the death of Sir *Charles Morgan*.

The bill was filed by Sir *Charles Morgan*, the son, and it stated that the purchase-money of 20,000*l.* might properly be apportioned, by attributing 4633*l.* 15*s.* to the lands comprised in the fourth part of the schedule, and 15,366*l.* 5*s.* to the other lands. That, owing to the death of Sir *Charles Morgan*, it was impossible to carry into effect the intended execution of the joint power of appointment; but that the same, as to the lands referred to, other than those comprised in the fourth schedule, ought to be treated as conclusively agreed to be executed; and that the Defendants, *Milman* and *Morgan*, ought to be directed to concur with the Plaintiff in the conveyance of the lands to the Company; and that the purchase-money ought to be paid to the Plaintiff as the executor of Sir *Charles Morgan*, the Plaintiff waving any claim thereto in his own right. The bill prayed a declaration accordingly, and that the Railway Company might be decreed specifically to perform the contract; and that the Defendants, the trustees, might be decreed to concur with the Plaintiff and all other necessary parties in conveying to the Railway Company the lands comprised in the first, second, and third parts of the schedule.

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The Company submitted to act as the Court should direct, but declined to complete the purchase under the contract which had been made, without the sanction of the Court.

Argument.

Sir *W. P. Wood*, Mr. *Rolt*, and Mr. *Woolley*, for the Plaintiff, in support of the argument that the contract was binding, and that the parties entitled in remainder were concluded by it, cited *Campbell v. Leach* (a), *Coventry v. Coventry* (b), *Shannon v. Bradstreet* (c), *Mortlock v. Buller* (d), and *Coles v. Trecothick* (e); and they distinguished the case from that of *Blagden v. Bradbear* (f). The case of *Wright v. Woodhead* (g) was also mentioned.

Mr. *Glasse* and Mr. *Milman* for the Defendants beneficially interested in remainder under the settlement, and for the trustees.

Mr. *Osborne* for the Railway Company.

Judgment.

VICE-CHANCELLOR:—

This is a bill for specific performance of a contract. The case is singularly circumstanced. By a settlement, made in the year 1844, the estates in question were settled to such uses as the late Sir *Charles Morgan* and the Plaintiff his son should jointly appoint, and subject to such appointment to trustees for 500 years, and then to the late and present Sir *Charles Morgan* successively for life, with remainder to the sons of the present Sir *Charles Morgan* in tail. There was a power in the settlement for

(a) 1 Amb. 740; and see p. 749—Per Lord Chief Justice *De Grey*.

(b) 2 P. Wms. 222.

(c) 1 Sch. & Lef. 52.

(d) 10 Ves. 315—Per Lord *Ellenborough*.

(e) 9 Ves. 234.

(f) 12 Ves. 466.

(g) See Appendix, p. lvi.

the trustees, with the consent of the late and present Sir *Charles Morgan*, or the survivor of them, to agree with the promoters of any Railway or Canal Company for the sale of any part of the settled estates, and for the amount of the consideration to be paid for the same, and the loss or damage which might be caused thereby to the settled property. The settlement also contained the usual power of sale and exchange, and provided that the monies to arise from such sale were to be held upon the same uses as the settled lands. The *South Wales* Railway being in the year 1845 about to be constructed through the estates, the late Sir *Charles Morgan* authorised his solicitor, Mr. *Burley*, to negotiate with the Company for the sale of any part of the land which they might require. [His Honour referred to the circumstances which took place, as above stated, up to the death of Sir *Charles Morgan*.] The joint power of appointment vested in Sir *Charles Morgan* and the Plaintiff was not exercised; and it is now gone by the death of the late Sir *Charles Morgan*. The Plaintiff, who was his executor, and also was individually one of the donees of the joint power, has contended in this suit, that, notwithstanding the absence of any formal exercise of the power, the estate is bound, and that he is entitled to have the purchase completed against the Company and the parties interested in remainder; and the question which I have to consider is, whether the Plaintiff is or is not entitled to the decree of this Court for that purpose.

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On looking into the cases, I think they leave no doubt that a valid contract of sale, which can be enforced against a donee of a power, independent of any conduct on his part, will in equity be binding on the remainderman; but I think they go no further; and I do not think that a mere intention to sell under the power can, in the absence of any contract binding on the donee by force of the contract, prevail against the remainderman. The re-

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mainderman cannot, I think, be affected by the conduct of the donee of the power. The question, therefore, as it seems to me, in this case, must be,—was there at any time in the life of the late Sir *Charles Morgan*, a contract for the sale of the lands in question which could have been enforced against him and against the Plaintiff, independently of the Company's possession? My opinion is, that there was not. The nearest approach to a contract is in the receipt for the 7500*l.*; and there is some difficulty in founding a contract upon that document, from the lands which were intended to be referred to not being in any manner described in it: but apart from that difficulty, the contract, evidenced by the receipt, is to sell at a price to be ultimately fixed, and the price never was fixed in the lifetime of the late Sir *Charles Morgan*. At no time, therefore, as I apprehend, during his life, could a bill have been maintained against him or against the Plaintiff upon the contract merely, for specific performance; and under these circumstances I think that the remainderman cannot be held bound.

The case of *Campbell v. Leach* (a) was much referred to in the argument. The Lord Chancellor in his work on Powers, has given an abstract of that case (b). It appears that in that case there were letters, which probably contained the contract between the parties. The Lord Chancellor, in an earlier part of the same work, in treating of the relief afforded by this Court, with reference to the instrument by which a power is attempted to be executed, says, "It is only necessary that the intention to execute the power should appear clearly in writing; whether the donee of the power only covenant to execute it, or by his will desire the remainderman to create the estate, or merely enter into a contract not under seal to execute his power,

(a) 1 Amb. 740.

nom. *Leach v. Campbell*. See

(b) 2 Sugd. Pow., App., No. 25,

also 2 Sugd. Pow. 137, edit. 7.

or by letters promise to grant an estate, which he can only do by an exercise of his power, equity will supply the defect" (a). And the note citing the authority for the latter clause of the sentence is, "See and consider *Campbell v. Leach*." The probability is, that the case turned upon the effect of the letters which had been written by *Pryce Campbell*, the father of the infant. In this case there is no such contract as I can enforce against the remainderman, and perhaps the strict course would be to dismiss this bill; but I will, however, if the parties desire it, direct a reference to the Master to inquire whether it will be fit and proper for the trustees to adopt the contract.

(a) 2 Sugd. Pow. 115, edit. 7.

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## PEARCE v. GARDNER.

Dec. 20th.

**JOHN WOOLRIGHT**, by his will, dated in 1842, devised to *Pearce* and *Radley* (and another trustee, who disclaimed) the residue and remainder of his freehold, copyhold, and leasehold messuages, lands, and hereditaments, goods, chattels, ready money, securities for money, stocks, funds, debts, and other personal estate and effects whatsoever, unto and to the use of his trustees and executors thereafter named, their heirs, executors, &c., upon trust that they or the survivors or survivor of them, or the heirs, executors, administrators, and assigns of such survivor, should, with all convenient expedition, and within five years after his decease, absolutely sell and convey, assign, or otherwise dispose of such of the same premises as should be of a saleable nature as therein mentioned, with a declaration that their receipts should be sufficient discharges, and that they should stand possessed of the produce of the sale, upon trust, subject to the payment of debts, for the wife

A devise of real and personal estate to trustees, with a direction for sale with all convenient speed and within five years, and to apply the proceeds in payment of debts and legacies, and invest the residue upon trusts for the widow and children of the testator—*Held* to empower the trustees to sell after the five years had elapsed.

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and children of the testator as therein mentioned. *John Woolright* died in September, 1846. In July, 1852, *Pearce* and *Radley* contracted with *Gardner* for the sale to him of the *Barham Wood Estate*, in *Hertfordshire*, part of the real estate of the testator comprised in the residuary devise. An objection being taken that the trust for sale was at an end before the contract was made, the vendors filed their claim against the purchaser for specific performance of the contract.

Argument.

Mr. *Campbell* and Mr. *Bright* for the Plaintiffs, the vendors, submitted that their power of sale did not expire at the end of the five years: *Witchcot v. Zouch* (a).

(a) 1 Rep. in Chanc. 183. The Registrar's Book was examined by the counsel for the Plaintiffs, and the following note of the case extracted:—

Upon hearing of this matter &c., and the scope of the suit being to compel trustees to make sale of lands according to a trust created by Sir *J. Zouch*, who, being seised of lands in the county of *Lincoln*, did by his will, dated 1648, devise unto the said Defendants, *Anthony* and *Charles Zouch* and *J. Hutton*, since deceased, several manors and lands in the bill mentioned, to the intent that they or any one of them, or the survivors or survivor of them, and their heirs, should make sale thereof for payment of his debts; and of his said will, made the Defendants and said *J. Hutton* executors; and by his said will appointed his said executors, and the survivors and survivor of them, to come to an ac-

count concerning the premises quarterly before *G. R.*, *F. Zouch*, and *Thomas Zouch*, whom he made supervisors of his will, and desired the survivors or survivor of them to take the accounts of his said trustees and executors; And by his said will appointed that what part of the premises should not be sold by his executors and trustees, or what surplusage should arise from the sales thereof, should be by them employed in land or otherwise, for the benefit of *Francis* his eldest son, and the heirs of his body lawfully begotten; and if it should happen to the said *Francis* to depart this life before his full age, having no issue of his body lawfully begotten, then to the use of *John Zouch*, his youngest son, and the heirs male of his body lawfully begotten, and if he should die before his full age having no issue of his body lawfully begotten, then to the use of

That the five years was directory and not conditional, and only mentioned as a period within which the testator de-

the said dame *Margaret*, her executors, administrators, or assigns. And by their bill further setting forth, that the said executors, after the death of the said Sir *J. Zouch*, entered upon the lands and took upon them the execution of the trusts, and by the rents and profits and money arising from the sale of the said lands have raised sufficient to discharge all debts and legacies, but have not given any account thereof yearly to the supervisor, according to the direction of the will, whereby the surplus thereof might be known and employed, according to the will; and the said *Francis Zouch* being dead before his full age, and without issue of his body, and *John Hut-ton*, one other of the executors, being also dead, the Defendants being the surviving trustees, and having not made a sale of all the lands devised by the will to be sold, pretend that they cannot now make sale thereof, for that the same was to be sold within four years after the testator's death, which time is elapsed, whereby the said dame *Margaret* is like to be defeated of the surplus of the estate devised to her by the will; and therefore to have an account of the money raised by receipt of profits or sale of the devised land, and to compel the Defendants to make sale of the residue, and to have the sur-

plus employed to the uses limited in the will, is the effect of the Plaintiff's suit.

And the Defendants by answer confess the will of the said Sir *J. Zouch*, and the devise of lands to be sold to such uses as is before expressed. And the Defendant *C. Zouch*, by answer, sets forth that after the testator's death the trustees entered upon the devised lands, and received the profits thereof or such parts as are unsold, from the time of his entry until sale thereof, and of the remainder unsold until this time. But denies that he hath, out of the real and personal estate, more than sufficient to pay the debts of the said testator; but that there are debts still to pay, which cannot be paid without sale of the manor of *O.*, being part of the devised premises yet remaining unsold; and sets forth that *Francis Zouch* dying before age, and administration of his estate being granted to the said dame *Margaret*, by virtue whereof she hath received several sums of money which the Defendant received in right of the said *Francis*; and saith, that by reason that the four years appointed for sale of the said lands is elapsed, he cannot satisfy purchasers that the Defendants have a good title or power to make sale of the lands; and submits to proceed in the trust, and to make

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PEARCE

v.

GARDNER.

Argument.

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 PRACE  
 v.  
 GARDNER.  
 —  
*Argument.*

sired the sale to take place, as a direction to sell forthwith: *Chambers v. Howell* (a). It was analogous to the case of a deed of trust for the benefit of creditors who were to execute it within a certain time; yet creditors who came in after the time specified were not excluded. Sales made under the Insolvent Acts were upheld, although the directions of the Acts had been in some respects departed from: *Mather v. Priestman* (b), *Cole v. Coles* (c), *Wright v. Maunder* (d). If the trustees had not performed the duty within the time they were directed to do it, they were responsible to the cestuis que trustent for the consequences of the delay; but it was not the less necessary that the office or duty should still be executed: *Hawkins v. Chappel* (e), *Gaskell v. Harman* (f).

Mr. Rolt and Mr. Bevir, for the Defendant, argued, that,

sale of the said manor, and to give an account as this Court shall direct.

[Defendant *Anthony* denies having received any monies, or having acted in the trust, except in executing conveyances, and submits to act as the Court shall direct.]

And the Court being of opinion that no advantage ought to be had or made of the lapse of the said four years' time limited for sale of the said lands, to avoid the execution of the trust, or prejudice the Defendant in her claim to the surplus of the estate, according to the appointment of the will, doth therefore order and decree, that the said Defendants and all &c., make sale of the said manor of O. yet remaining unsold, and in so doing shall be protected and saved harmless by this Court. And that the Defendant *C. Zouch*,

the other Defendant refusing to intermeddle in the said trust, shall, by the money raised by sale of the said manor, and other monies received out of the said trust, and yet resting in his hands (if any be), in the first place pay and satisfy all the debts of the said testator yet remaining unpaid, and shall account for and employ the surplus of the estate to such uses as are appointed by the will of the said testator, and for so doing is to be protected and saved harmless by the said Court. Reg. Lib. 1660. B. fol. 112. 12 Car. 2.

(a) 11 Beav. 6.

(b) 9 Sim. 352.

(c) 6 Hare, 517.

(d) 4 Beav. 512.

(e) 1 Atk. 623.

(f) 11 Ves. 507—Per Lord Eldon.



whatever might be the mode of executing the trust in a case in which the trustees had failed to exercise their power within the prescribed time, there was no ground for the proposition, that the power in the trustees must subsist for an indefinite period against the express terms of the will. The case was more analogous to those in which a direction was given to sell an estate after the death of a tenant for life; in which it had been held, that there was no power to anticipate the time of sale, by effecting it in the lifetime of the tenant for life: *Blacklow v. Laws* (a). It would follow, that, if the testator had directed that the sale should not take place until after the expiration of five years, the power could not have been executed until that time. Why was a direction to defer imperative, and a direction to accelerate to be disregarded? It had been laid down, that, if a man makes his will that his feoffees shall alien his land, before the alienation the heir may take the profits, and they are seised to his use; and if an alienation be not made by them, the heir shall have the land for ever (b). There was, at least, so much doubt of the continued existence of the power in the trustees, that the Court would not enforce specific performance: *Pyrke v. Waddingham* (c).

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v.  
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Argument.

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VICE-CHANCELLOR:—

The trusts created by the will of the testator are, with all convenient expedition, and within five years after his decease, absolutely to sell and convey the premises. There is nothing in the will importing a negative on a sale being effected by the trustees after the expiration of five years. If there had been a provision negating any sale by the

Judgment.  
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(a) 2 Hare, 40.

Pow. App. 510, No. 1.

(b) Cas. temp. Hen. 7, 2 Sugd.

(c) 10 Hare, 1.

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 {  
*In re*  
 MORLEY'S  
 WILL.  
 —  
*Statement.*

thereout certain debts, and to pay the residue to certain legatees therein mentioned; and, subject as aforesaid, she directed that her trustees should stand possessed of the monies to arise from her said copyhold and real estates and the rents and profits thereof until such sale, as part of her residuary personal estate. The testatrix then gave and bequeathed all the rest, residue, and remainder of her estate and effects, real and personal, of what nature or kind soever, unto *D. Morley* and *F. Morley* and *J. Morley* (two other children of her late husband's son *William Morley*), their heirs, executors, &c., according to the nature thereof, in equal shares, as tenants in common.

After the death of *Sarah Morley*, *D. Morley* and *W. Maxwell* contracted to sell the copyhold tenement devised by the will of the testator *W. Morley*. The purchaser objected to the title, on the ground that the copyhold did not pass by the will of *Sarah Morley*. An application for an order, on that ground, to vest the tenement in the purchaser, was adjourned from Chambers for argument in Court.

*Argument.*  
 —

Mr. *Baily* and Mr. *Grenside* for the vendors.

Mr. *Russell* for the purchaser.

Mr. *Waller* for the lord of the manor.

The authorities referred to on the argument were, *Lord Braybroke v. Inskip* (a), in which it was laid down, that the legal estate of a trustee would pass by a will containing words large enough, and no expression in it authorising a narrower construction than the general legal construction; and the case *Ex parte Whitacre*, 22nd of July, 1807, where there was a devise by a mortgagee in fee of all the rest and residue of his lands and hereditaments, and

(a) 8 Ves. 436—Per Lord *Eldon*.

goods, chattels, mortgages, monies and securities for money, and all other his real and personal estate, unto four persons (nephews and grandnephews of the testator), to be equally divided between and among them as tenants in common, and to their respective heirs, executors, and administrators, according to the nature of their respective estates. One of the devisees died, and left an infant heir, who was held to be an infant mortgagee of one fourth part of the mortgaged premises, within the statute of 7 Anne: 1 Sand. Uses, p. 421, n., Ed. 1844. *Ex parte Brettell* (a) was also cited. It was suggested, that, unless absolutely necessary, it would be unreasonable to construe the will of the trustee of a copyhold estate as devising the trust property to three persons as tenants in common, involving the trust estate in the additional expense of several admittances.

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*In re*  
**MORLEY'S**  
**WILL.**  


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*Argument.*

The VICE-CHANCELLOR said, that, after having heard the argument, he had come to the conclusion, that, upon the true construction of the will, the legal estate in the trust property did not pass. He thought that it could not have been intended by the testatrix that it should pass by the description of all "other her real estate whatsoever" contained in the first part of the devise, as the estates there referred to were clearly intended to be sold, and the proceeds were to form part of the testatrix's residuary personal estate. All the testatrix's real estate being comprised in the first part of the devise, he thought that the disposition of the residue of the estate, real and personal, must be construed merely as designating the parties who were to take, and not as disposing of other real estate.

*Judgment.*  


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(a) 6 Ves. 576.

1852.

Nov. 8th,  
22nd, 23rd, &  
24th.

1853.

Jan. 8th.

A decree by some against the others of the deputy day oyster meters, having the exclusive right of shovelling, unloading, and delivering oysters within the port of *London*, for an account and equal apportionment amongst the meters of the scorage dues received by them,—such decree being founded on the immemorial existence of the body of meters, which was held to be proved, notwithstanding the meters were originally labourers, and that they habitually described themselves as servants of the corporation of *London*.

## THOMPSON v. DANIEL

**A** BILL by sixteen of the deputy day oyster meters of the city of *London*, against the other two members of that body, for an account and equal apportionment of all monies received by the Defendants and Plaintiffs as deputy day oyster meters in the exercise of their office, and for an injunction. The Plaintiffs stated the following case:—

From time immemorial the mayor and commonalty and citizens of *London* have of right had and exercised the office of measurer, and the measuring of all wares and merchandise brought into the port of *London*, being measurable; and that such office was exerciseable by the lord mayor for the time being or his sufficient deputies. The deputy oyster meters of the city of *London* have from time immemorial held and exercised the exclusive right and privilege, by themselves or their servants, of shovelling, unloading, and delivering all oysters brought for sale in any boat or vessel along the water of *Thames*, and to

Proof that there had been an equal division of the scorage dues received by the deputy day oyster meters for the last sixty years,—a former decree in a suit in which the common right of the meters was in question,—and earlier evidence that the meters were employed by turns, *held* to be sufficient to shew that they were entitled to an equal division among themselves of the scorage dues which they received.

It being proved, that, for at least sixty years past the affairs of the deputy day oyster meters had been regulated by themselves, and there being no evidence of any interference with the body either by the yeomen of the waterside or the corporation, it was *held* that the deputy day oyster meters had the right of making bye-laws and regulations binding on their body, as to the manner in which their duties should be performed.

*Held*, also, that however it might be competent to the corporation of *London*, in such corporate character, or as representing the yeomen of the waterside, to alter the rights and duties of the office of the deputy day oyster meters, yet it was not competent to the corporation, in exercising the mere power of appointing meters, to appoint one who should hold his office upon terms inconsistent with those which were prescribed by the regulations of the body of meters.

That the Court would not charge the Defendants with default in declining to receive an additional payment per peck for the services of the holdsmen, which many buyers would voluntarily pay, but to which the meters were not lawfully entitled; and would, on the other hand, allow the Defendants such reasonable payments as they had made for the labour of the holdsmen, by whom the duty of shovelling, unloading, and delivering the oysters was performed.

every place throughout the limits of the port of *London*, and there measured, shovelled, unloaded, and delivered; and to have and receive a compensation for such duties, at the rate of 8s. for every twenty bushels for the first hundred bushels; and 4s. for every twenty bushels for the remainder of any cargo of oysters. The deputy oyster meters have from time immemorial consisted of two distinct classes or bodies, the one consisting of eighteen persons, denominated deputy day oyster meters; and the other, consisting of three persons, being deputy night oyster meters. All the deputy day oyster meters have been from time immemorial entitled to participate in equal shares in all sums of money receivable by them individually for the said duties; and every of them is bound to bring all his receipts in respect of the same into a common fund or account, divisible in equal shares among the eighteen; and they are entitled and liable to sue and be sued collectively in respect of such right. The right is established by two causes, tried before the Court of Exchequer: *Milbourne v. Fisher*, in 1783, and *Laybourn v. Crisp*, in 1838 (a). The manner and course of the office and business discharged by the deputy day oyster meters have always rested with themselves, and, in any differences between them, has been decided by the majority—the corporation of the city of *London* never having claimed or exercised any right to control their course of business. The deputy day oyster meters had been accustomed to appoint members of the fellowship of porters to attend as their servants and agents, to perform the labour of measuring, shovelling, unloading, and delivering the oysters, the persons so appointed being called holdsmen. The action of *Milbourne v. Fisher* was for work and labour in shovelling, unloading, and delivering the oysters, and was brought by two of the deputy day oyster meters for the

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 THOMPSON  
 v.  
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 —  
*Statement.*

(a) 4 M. & W. 320.

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Statement.

common benefit of all of them, and for establishing their right to the compensation which ought to be paid for such work and labour. Until the 5th of October, 1850 (when the Defendants *Daniel* and *Morris* were appointed deputy day oyster meters), all monies received in respect of such compensation were divided equally among them. A list was kept, and each of the eighteen meters in rotation took upon himself the duties of "weeksman," whose office it was to allot the boats to each of the meters in his turn. The meter to whom the boat was allotted received from the master of the boat the scorage dues for shovelling, unloading, and delivering the oysters, and paid the amount over to the weeksman, who received and paid it over to the meters. There were three meetings in every year (in January, May, and October), at which the meters produced accounts of what they had severally received from the weeksman; and those who had received more than an equal share brought back the excess, which was divided amongst those who had received less, until all were placed on an equal footing. The offices of deputy day oyster meters had, up to the year 1850, been the subject of sale and purchase, with the approval of and on payment of a fine to the oyster meters in chief, or yeomen of the waterside. On the death of a deputy day oyster meter, who had not sold his office, the office was considered to have dropped, and the appointment devolved upon the yeomen of the waterside. The corporation of *London*, in the year 1823, purchased the offices of yeomen of the waterside. In 1834, a vacancy occurred amongst the deputy day oyster meters, but it was not filled up,—the corporation taking the profits of the vacant office, and conforming to the regulations of the body of deputy day oyster meters, and paying the accustomed fines for not serving as weeksman. A second vacancy occurred in 1848, which also was not then filled up,—the corporation in like manner conforming to the regulations and taking the profits of the of-

fice, until October, 1850, when the Defendants were appointed.

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 THOMPSON  
 v.  
 DANIEL.  
 Statement.

The Plaintiffs also stated that the purchasers of oysters had been immemorially in the habit of paying one penny per peck to the holdsmen for the labour of shovelling, unloading, and delivering the oysters; and that the Defendants had caused public notices to be fixed up in the market informing the purchasers that they were not required to pay the fourpence per bushel theretofore charged by the holdsmen, or any other sum, for measuring or shovelling the oysters purchased at *Billingsgate*; and the Plaintiffs alleged that the appointment of the Defendants had been made upon certain terms of arrangement between them and the corporation of *London*, but that the deputy day oyster meters were not bound by those terms or by that arrangement; and the Plaintiffs stated that the Defendants had arranged with *Alston* and *Skinsley*, two of the principal salesmen of oysters in the city of *London*, to unload all their oysters, and had received all the profits and fees payable for the unloading and delivering of oysters for them, except the one penny per peck payable by the purchasers to the holdsmen, which the Defendants had not received.

The bill prayed that an account might be taken of all dues and sums of money which had been—or, but for their or his wilful default—ought to have been received by the Defendants and Plaintiffs, each and every of them, as deputy day oyster meters, for or in respect of oysters brought on board any oyster vessel to any market within the limits of the port of *London*, and that the amount thereof might be apportioned equally to each of the Plaintiffs and Defendants, and that each of the Defendants might be decreed to pay what should be found due from him respectively on the taking of such account; the Plaintiffs

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thereby offering to pay what, if any thing, should be found due from them respectively on taking such account; and if necessary, that the Defendants might be restrained by injunction from receiving any of the said dues, and from in any manner obstructing or interfering with the usual and accustomed course of the office, and from doing any act in contravention of the bye-laws and regulations thereof; and that the weeksman in the ordinary course might be authorised exclusively to receive the said dues; or that a receiver might be appointed by the Court.

The Defendants by their answers submitted, that the corporation of *London* and their committee and officers claimed and exercised the right to control the conduct of the deputy day oyster meters, irrespective of any bye-laws or regulations which they might have made among themselves; and they stated, that, prior to their appointment as deputy day oyster meters, the committee of the corporation of *London*, under the authority given to them by the corporation, required the Defendants respectively to submit and agree to observe as the condition of their appointment the following rules and orders:—1. To observe and fulfil the obligations of their oaths of office. 2. Each meter is to attend daily at *Billingsgate* at such hours and on such days as the oyster merchants might require, and to perform the duty of meter and holdsman in shovelling, measuring, and delivering the oysters to purchasers to the best of his skill and ability; and to conduct himself with sobriety and diligence, and with civility to the merchants, the salesmen, and the oyster buyers, whether rich or poor. 3. Each meter to render to the office of clerk and collector of the market weekly an account of the oysters daily measured by such meter, and to receive from the merchant the amount of the scorage and metage, and the city dues of 1s. and 1d. per boat for each voyage in which he acts as meter, and to pay the same to the clerk



and collector of the market on the Monday in each week, at such times and places as he might appoint. 4. To render weekly to the weeksman of the oyster meters a copy of the account rendered to the clerk of the market. 5. To receive from the clerk of the market monthly, under the orders of the committee, the amount of the scorage so paid to him in respect of the quantities measured by each meter during the preceding month, out of which the meter is to pay his assistants for doing the duty of shovelling, &c. 6. No meter to be permitted to act as salesman. 7. The appointment to continue during the pleasure of the committee. Lastly. If any person so appointed shall take or permit any other person to take any fee or gratuity from buyer, seller, or from any other person, other than the scorage dues, or if he shall violate these regulations or any other regulations that the committee may from time to time pass, or be guilty of incivility to the officers of the market, or to the buyers or sellers, he will be instantly dismissed.

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The Defendants did not admit the immemorial right of the deputy day oyster meters to shovel, unload, and deliver the oysters, except in so far as it appeared by the case of *Laybourn v. Crisp*; and they denied the immemorial right of equal participation, and the common interest in the monies received in respect of the office. The Defendants said, that the appointment of holdsmen by the meters, and the payment by the purchasers of 4*d.* per bushel in addition to the said compensation of 8*s.* and 4*s.* per score, commenced not earlier than the year 1770; and they submitted, that such appointment, by the meters, of holdsmen, who took no oath of office, which was made as thereby stated on the nomination of the sellers of oysters, to do the work of measuring, shovelling, and unloading oysters, was illegal, and that such duty ought to be done by and in the presence and under the personal inspection and di-

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*Statement.*

rection of the meters, who took the oath to do justice between buyer and seller, and who were liable to removal and indictment, if, by exaction or any other misconduct, they violated the duty and oath of office. They said, that since the time when they were respectively appointed to be meters, they had for their own parts continued to shovel, measure, and discharge in their said offices of meters all cargoes of oyster vessels sold by or consigned to the two dealers named in the bill, as they had theretofore done in the character of holdsmen; and that they had, in fact, acted exclusively and independently of any other meter; and that they had, in discharging such cargoes, done the work of meters and holdsmen, and had not charged or received the 4d. per bushel for shovelling and filling the measures as the other holdsmen did, but had paid the men they employed under them out of the scorage dues, being the reasonable compensation aforesaid received by them, and thereby reduced the amount of such dues, and diminished their own profits by about three-fifths.

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*Argument.*

Sir *W. P. Wood*, Mr. *Willcock*, and Mr. *Harrison* for the Plaintiffs.

Mr. *Rolt* and Mr. *Randell* for the Defendants.

Upon the opening of the case it was observed by the *Vice-Chancellor*, that the case of the Plaintiffs involved the necessity of establishing that the corporation of *London* had not power to appoint the Defendants to the office of deputy day oyster meters, except upon the terms of the Defendants conforming to the bye-laws of the latter body; and that the corporation, whose powers were then in question, were not parties to the suit.

The case stood over on the suggestion that the corpora-

tion would be willing to appear in the suit as if they had been made parties to it; and, upon the subsequent argument, the corporation appeared by the same counsel as the other Defendants.

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v.  
DANIEL.  
—  
*Argument.*

The VICE-CHANCELLOR, after stating the issue raised by the pleadings, that much evidence, both parol and documentary, had been adduced in the cause, to some portions of which it would be necessary to refer in determining the several points of the case; and after observing, also, that upon the case being first opened, he had thought that the corporation of *London* had such an interest as required that they should be represented, and that they had accordingly appeared at the hearing, and submitted to be bound, proceeded:—

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*Jan. 8th.*  
—  
*Judgment.*

The Plaintiffs have based their case upon the immemorial existence of the body of which they form part; and it was, I think, necessary for them to do so, for, independent of any immemorial constitution, it is difficult to see how they can stand in any better position than that of deputies appointed by persons who were themselves deputies; or how, if standing in that position, they could be otherwise than subject to the orders of those who appointed them, or of those from whom the appointment was originally derived.

The first question to be considered, therefore, appears to me to be, whether the Plaintiffs have established the immemorial existence in the deputy day oyster meters of the right of shovelling, unloading, and delivering,—involving, as I have already observed, the immemorial existence of the office itself. I have very carefully examined the evidence on this point, and I am fully satisfied that it is abundantly sufficient to make out this part of the case.

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 v.  
 DANIEL.  
 Judgment.

The oath of the yeoman of the waterside in the time of Edward the Fourth proves that there might be deputies. The report of the 22nd of April, 1707 (a), finds, that several freemen of the gang of fellowship porters, about twenty-one in number, were employed in unloading and shovelling the oysters. The petition of the yeoman, of the 22nd of October, 1707, states the payment of 6s. per day, or 12s. per vessel, for heaving the oysters out of the vessel, to have been a long time accustomed. The oyster proprietors, in their petition of 1777, describe the parties of whom they complain, as deputies. The report of the 24th of July, 1777, refers to the appointment of the twenty-one deputies by the yeoman, distinguishes between the day and night meters, and states the distinction to have been known as far back as the committee could learn. The case of the oyster proprietors, appended to that report, states the business of measuring to have been done time out of mind by twenty-one of the fellowship porters. And without placing any reliance upon the decree in *Milburne v. Fisher*, where the allegation of the immemorial existence of the office is loose and doubtful, the finding upon the issue in *Laybourn v. Crisp* seems to me to be decisive upon the point. It was urged on the part of the Defendants, that the corporation of *London* were not parties to that suit; but the question was a question of custom, and it was tried with the parties most interested in disputing it, and the verdict therefore is entitled to great weight. Besides, it appears clear, from the evidence, that the corporation of *London*, although not actually parties to the suit, contributed to the expenses incurred in the prosecution of it.

It was further urged on the part of the Defendants, that the proceedings to which I have referred prove the deputy

(a) By a committee of the corporation to whom a petition on the subject had been referred.

oyster meters to have been originally mere labourers, and shewed that they treated themselves as servants of the Corporation; but it does not appear to me to be material by what name they were called, or whether they described themselves as servants of the Corporation, provided they were members of an immemorial body, which I think the evidence satisfactorily proves that they were. I am of opinion, therefore, that no further inquiry is necessary, or ought to be directed, upon this part of the case, the more so as the bill in this case is simply for an account, and does not seek the establishment of any custom.

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 DANIEL.  
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It being then proved that there has been, from time immemorial, this body of deputy day oyster meters, having the exclusive right of shovelling, unloading, and delivering oysters, the next questions for consideration appear to be, whether this body has had and exercised the power of making regulations amongst its members, and if so, whether any regulations exist prescribing an equal division of the monies received among all the members of the body? I apprehend that a body of this description may have the power of making bye-laws to regulate the rights and duties of its members, and that, whether they are to be deemed to have the power or not, must, in the absence of express provision, depend upon usage. Now, the evidence in this case shews that, at least for the last sixty years, the affairs of this body have been regulated by themselves alone; and, looking back to the earlier documentary evidence, I do not find that there has been any interference with the body, either by the yeoman of the waterside or by the Corporation; and in this state of circumstances, I think this body must be considered to have the right of self-government. It is true that they are described as deputies, and that they have in some instances called themselves the servants of the Corporation, and no doubt they are bound to the observance of certain duties;

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but I do not see that it is inconsistent with that obligation that they should prescribe amongst themselves how those duties should be discharged; nor do I think that any weight is due to their having described themselves as servants of the Corporation, for in a sense they are servants. They are bound to discharge the services they have undertaken, although they may regulate amongst themselves the mode in which those services shall be performed.

It is to be considered, then, whether there has been any regulation among the members of this body, that the monies received for the shovelling, unloading, and delivering should be divided equally between them; and upon this point we must again resort to the evidence, and the evidence I think establishes the regulation. It is proved by the parol evidence, that, for the last sixty years, there has been an equal division of these monies. In *Melbourne v. Fisher*, in 1777, the Defendants, by their answer, distinctly raised the question whether the Plaintiffs had a common right to recover, and the ultimate decree was for payment to the Plaintiffs; and going yet further back, it appears that in early times, when the payments were per day or per voyage, the meters were employed by turns, which tends to shew that they then took equally. I am of opinion, therefore, that this case must be dealt with on the footing, that, according to the regulations of this body the monies received for the shovelling, unloading, and delivering, were to be divided equally among all the meters.

We have then to consider whether it was competent to the Corporation, as representing the yeoman of the water-side, to appoint deputy day meters, who should hold their office upon terms different from those prescribed by the general regulations of the body; and I am of opinion that it was not. The Corporation have, no doubt, the power

to appoint to the office; but when the appointment is made, the rights and duties incident to the office must, I think, attach upon the person whom they have appointed. If the Corporation have power, either as representing the yeoman of the waterside or in their own corporate character, to alter the rights or duties of the office, they may exercise that power, and all the officers will then become subject to the mere rights and duties they may impose; but they cannot, I think, by virtue merely of their power to appoint, introduce rights and duties inconsistent with the rights and duties attaching to the office to which they appoint. I think, therefore, the Plaintiffs have established their right to a declaration that all monies received ought to be divided equally among the meters.

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It was asked, however, that the decree should go further, and that there should be a declaration that the Defendants should not be allowed in account the monies paid by them to their holdsmen; but I am of opinion that there ought to be no such declaration, and that, on the contrary, there must be a declaration that the Defendants ought to be allowed in account all monies properly paid by them for labour in shovelling, unloading, and delivering. The bill puts this part of the Plaintiffs' case on immemorial usage; but, at the bar, it was admitted that the claim could not be maintained on that ground. It was rested simply upon this, that the purchasers of the oysters were willing to make the payment of the one penny per peck to the holdsmen, by which all claim for their labour would be satisfied, and that the Defendants, as between themselves and their co-meters, were bound to accept the payment; but in this view of the case the charge against the Defendants is for wilful default; and I am aware of no instance in which this Court has charged parties for wilful default where there has been no legal right to recover. There is no proof that any purchaser

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ever tendered the payment to the Defendants; and how is the Court to ascertain whether the purchasers would have paid or not? Besides, according to the decision in *Laybourn v. Crisp*, it is the duty of the meters, either themselves to do the work of shovelling, unloading, and delivering, or to provide for its being done; and this is in fact the consideration for their receiving the eight shillings and four shillings from the salesmen. And if this Court were to charge the Defendants for wilful default, it would be lending itself to the exaction of an unauthorised charge; for the Defendants, if so charged, would of course be driven to obtain from the public the one penny per peck. This Court certainly will not be instrumental in promoting an illegal exaction; and I think therefore, that, as to this matter, the declaration must be as above.

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*July 26th,  
27th, & 30th.*

The account was taken at Chambers under the decree, and questions arose whether the Defendants were to be charged with the additional payment per peck which they might have received from persons voluntarily paying it, but which they had not received—whether they were entitled to allowances in their accounts for sums paid by them for the labour of shovelling, unloading, and delivering the oysters; and if they were not entitled to the sums charged by them in their accounts, what sums were reasonable and proper to be allowed; and also whether the Defendants were entitled to an allowance in respect of the personal labour they had bestowed.

The particular charges in the accounts upon which the questions arose, and the nature of the arguments by which they were severally supported and resisted, are all adverted to in the judgment.

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Mr. Wigram, Mr. Willcock, and Mr. Harrison, for the Plaintiffs.

Mr. Rolt, Mr. Randell, and Mr. Hannen for the Defendants.

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—  
*Argument.*

VICE-CHANCELLOR (a):—

This case was adjourned from Chambers for the purpose of considering in what way the account that had been directed by the decree of my predecessor is to be carried into effect; and all that I have now to do, inasmuch as the account cannot be at this moment settled, is to state (which I think very desirable that I should speedily do, for the sake of all parties who are about to be engaged in the occupation to which this suit refers,) the principle upon which I shall feel it my duty, when the matter comes before me in Chambers, to proceed in taking that account.

*Judgment.*  
—

Now, the position of the Plaintiffs in this suit is certainly a very peculiar one. They are sixteen of a body, called the deputy day oyster meters, who by a long course of time—probably by immemorial custom—have acquired a peculiar monopoly, not only of measuring but of shovelling, unloading, and delivering the oysters which are imported into the port of *London*, and the two Defendants are the two other deputy day oyster meters—the whole body consisting of eighteen. Of course many observations might at all times be made in reference to the convenience or inconvenience of a monopoly of this description; but, as was said by Lord Abinger in *Laybourn v. Crisp*, Courts of law have no right in any way to deal with that consideration—all that they have to do is to see what the rights of the parties are, and to take care that those rights are carried into full effect.

(a) Sir William Page Wood.

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It appears that these officers, having no immemorial payment for the shovelling of oysters, were compelled to have recourse to legal proceedings, for the purpose of arriving at a quantum meruit for their labour; and accordingly, in a case anterior by some fifty or sixty years to *Laybourn v. Crisp*, the quantum meruit had been fixed at eight shillings per score for the first hundred, and four shillings per score for the next (a); and another jury, in *Laybourn v. Crisp* (b), confirmed that amount as a proper compensation for the labour. It was also decided by the Court upon the case coming back, that that was to cover all expenses—that is, that the eighteen meters were bound, for those payments of eight shillings and four shillings, to provide the labour necessary for shovelling and unloading.

It appears, however, that the business (as, of course, in all monopolies, one would expect the result to be) was a very profitable one, and large sums have been paid for the acquisition of the office,—so much it appears as from 1500*l.* to 2000*l.* It is perfectly plain, that those who were concerned in selling the office, could have no notion that the intended purchaser was a person likely to perform the duty in person, or that he paid his money for anything else than to obtain the patronage of this office, if I may so express it,—the power of appointing the person who really was to do the duty, and to obtain such profit therefrom as he might be able.

Amongst other sources of profit derived from the office, there was unquestionably the payment of a 1*d.* per peck by the purchasers of oysters, upon their being landed, to the holdsman, or the man who actually did the work; the consequence of which was, that these men were willing to do the work, as between themselves and the meters, for

(a) *Melbourne v. Fisher*, supra, p. 297.

(b) 4 M. & W. 320.

nothing; leaving to the meters the whole 4s. and 8s. as a clear profit. The bill, I think somewhat unadvisedly, puts the payment by the purchasers as an immemorial payment, and would seem, in some sense, to insist upon it as a right. The case of *Laybourn v. Crisp* determines that it was not a right, and the summing up of the learned Chief Baron in that case clearly intimates, that this was nothing more than a voluntary gratuity, which might or might not be paid at the will of the purchasers, as to which the parties must in that respect take their chance.

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Now, the course of proceeding since *Laybourn v. Crisp*, which was determined in the year 1836, was this: the Corporation of the City of *London* at that time held one of the eighteen offices which had fallen vacant, *in commendam*, if I may so term it; and the City contributed, in that respect, to the expense of that suit in supporting the rights of the deputy day oyster meters. The City afterwards acquired and held another of the offices *in commendam*, and the Corporation continued, down to the year 1850, (fourteen years after that decision), to divide the profits of the office, in respect of the two members whom they so represented, with the other meters; and at the same time that they did this, they submitted themselves, as representing two of the meters, to the general rules and regulations of the body, and submitted to be charged with the fines which were payable according to those rules if any meter did not undertake the duties in rotation,—there being no officer to perform such duties in respect of those two vacancies in what I may call a joint office.

In the year 1850, it appears that the Corporation thought it expedient,—and far be it from me to cast upon them the slightest appearance of censure for so doing,—that they should no longer sell those offices, in order ultimately, I suppose, to throw the trade in some manner open.

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—  
*Judgment.*

They resolved upon appointing two persons, not of the class that had theretofore been appointed, that is, persons of some degree of wealth who would pay for the office,—but two of the men employed usually in the actual duty of performing those functions,—and so far nobody could find any fault with their proceedings. But what they did further was this,—they attempted to limit these two men by regulations, bringing them into peculiar relations to the Corporation, separate and apart from the general regulations of the whole quasi corporate body of deputy day oyster meters. Now, looking to that body as being an ancient body, and looking to the fact of the Corporation having, as representing two of the members, subjected themselves to the rules and regulations of that body, one is rather surprised that that course was taken. It has now been established by the Court—by the decision of my predecessor, and, I should think, must have been known to the Corporation, that it was quite irregular and improper, on their part, to direct these two men to account to them or their officer in any way in respect of the fees of the office—that those fees appertained to a joint purse, in which all the day meters were interested, and out of which the Corporation itself had been drawing its share. Instead of placing those men in a peculiar relation to themselves, and of exacting from them certain promises, their duty was simply to put them, without payment if they thought fit, into the body of day meters; but, when that was done, to subject them to the general rules and regulations of the body. The Vice-Chancellor *Turner* clearly and distinctly states that to be his view of the case. [His Honour referred to and read passages of the preceding judgment, *supra* pp. 304—307]. That is, I think, a very clear and distinct principle, with which I must entirely accord. The judgment of the Vice-Chancellor appears to me to determine, that, when these men are once introduced into the body, they must consider

themselves free from all engagements which they may have unadvisedly though honourably entered into; because unquestionably they could not enter into such engagements to the prejudice of the body into which they were introduced. Apart, therefore, from all engagements with the Corporation, the duty of the Defendants now is to consider themselves as members of this immemorial body, and to act in harmony and accord with that body. The course unfortunately taken led to a very different practice, and the consequence was, that, instead of the Defendants taking their ships in due order, like the rest of the meters, they appropriated to themselves certain vessels, one of them being that class of vessels which brings the largest cargoes of oysters to market, and they set themselves vigilantly and industriously to do their duty towards those vessels which they had so taken in hand; that was irregular, but this is not a point for which the decree provides; and although the Defendants may be considered to have illegally interfered in the rota, yet if any provision was intended to be made in respect of their having had in this sense more than their share, it ought to have been provided for by the decree; but it has not been done: and as there is no adjustment of the equities between the parties in that respect, I must assume that the decree took it, up to that moment, to have been so far legally done, that they were to be allowed all payments made in respect of the work so done.

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Now the question comes, what are they to be allowed? and the main question turns upon this 1*d.* per peck which the purchaser was in the habit of paying.

With regard to the penny per peck, I think it clear, from the verdict in *Laybourn v. Crisp*, that it must be entirely optional with any purchaser whether he will make such a payment or not. If, therefore, it were demanded

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from the purchaser, I think it clear that it would fall distinctly within what the Vice-Chancellor declares in the judgment to be an illegal exaction. It does not distinctly appear from the evidence, that, before the year 1850, it was ever demanded as a matter of right; but, certainly, from the year 1850 the Corporation of *London* have taken great pains that it shall not be so demanded, and as owners of the market, and as having all those persons in a certain sense under them as their ministers, I think the Corporation did quite right in putting upon boards in public places a clear and distinct statement that no purchaser was bound to pay the penny. That having been done, the question remains, whether it is so improper that this penny should be received, that I am to exclude altogether, in taking any future account, the possibility of such receipt.

The case on the part of the Defendants has been placed as high as this,—that the penny is neither more nor less than a bribe from the purchaser,—that, as between vendor and purchaser, it operates as a bribe, and that in that sense it is strictly illegal to receive it. Of course, if it were a payment of that immoral description, this Court could not in any way contemplate the possibility of such a payment being made. The Court would in that case, as far as possible, take care that it should not be received, and frame its decree accordingly; but I cannot arrive at the conclusion which the argument supposes. It was argued that the meter is a humble minister of justice, that he is sworn to do justice between buyer and seller, and, it was asked, what should we think of any minister of justice, even in the humblest capacity, accepting a payment from one of the parties? It is not given for nothing: nobody supposes it is; and if not, it was said that it is neither more nor less than a bribe.

I think there are many other considerations to be taken

into view in this case. That payments or gratuities are made to many persons acting or performing duties in humble offices, is a matter of every day's notoriety; and there is nothing necessarily illegal, I apprehend, in persons who have duties to perform accepting gratuities from those for whom they perform them. Inexpedient, I think it is, as was the case with expedition money in this Court; I admit, indeed, that my own feeling is very strong upon the subject, but I do not sit here in a legislative capacity. Perhaps nothing could be worse than the expedition money I have referred to, and which was properly abolished. Nevertheless, that payment was treated as a legal payment while it existed, and compensation was given for its loss when it was abolished. The injury arising from such payments is plain and clear, but the injury is, I conceive, of a totally different character from that which was suggested in the argument. It is not that the buyer, by making these payments, gets a better measure; but the real evil is this, that those buyers who do not pay (none being obliged to pay) do not get so well served or so quickly served as those persons who consent to make the payment. That is the great evil of all gratuities and payments of this description; but, at the same time, that would not make them illegal. But there are also these considerations: Is it very easy after all to give a buyer of oysters more than he is entitled to? The measure is not found by the party who receives the gratuity—the measure is found by another party altogether. Is it very easy for the measurer to get into a given measure a greater quantity than the measure will properly hold? By dexterous management an extra oyster or two may be piled up in what is called the heaped-up measure; but, as I collect, it would require exceedingly dexterous management to give to the purchaser a greater quantity of oysters than he would be entitled to by the legal measure. The case

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does not rest there. Is it likely that the purchaser would get any advantage by the payment? He pays a penny per peck, and therefore the direct interest of the shoveller is to make as many pecks as he can from the bulk of the oysters. The very mode in which the gratuity is given by the purchaser is that which would tend in an exactly opposite direction to that which is suggested, of giving the purchaser a larger measure than he is entitled to. Moreover, the holdsmen are but servants of the meters; and though true it is, that the meter by means of the gratuity gets his work done cheaper and has an interest in it, still it is his business; he is the man who is sworn to give the measurement, and who is to be referred to in case of any complaint being made, and he has over him the Corporation of *London* to check his conduct and condemn him if he is guilty of any misdemeanour in performing his duty.

It should also be observed, that, in this case, we have the experience of two years. The evidence has been given at the end of two years, during which the double system has been going on. In some vessels the penny has been received, and in other vessels it has been prohibited. There is no complaint from any individual purchaser. Mr. *Alston*, who takes a strong part in this matter, has not found any witness to say, that a case has occurred in which any seller has complained that the buyer has had too much. I am clearly of opinion, therefore, that I cannot hold this payment to be illegal.

The next question is,—what I am to allow to those men who have rejected the payment, and who have in some instances, I do not suppose there are many, thrown back the pence when they were tendered by the purchaser; whereby the Plaintiffs say they have been injured in hav-



ing work found at an expense which would be needless, inasmuch as they say they could have procured the work to be done for nothing.

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I certainly think myself bound by the decree to make some allowance to the Defendants. The Court has had the whole matter before it; and, after considering what just allowances are to be made, I must hold, that the Court was of opinion that the parties were justified in making some payment, and therefore the proper payment made by them should be allowed. I cannot, however, allow the account in the form in which it is brought in by *Mr. Daniel* in his list of payments. The assistants whom he has employed are his son and a man of the name of *Huggett*. The Defendant appears to have received in a week 12*l*. 15*s*., and he states that he has paid for those two assistants 7*l*. 6*s*., besides the expense of refreshments, and 1*l*. 1*s*. for an extra man. Taking the 7*l*. 6*s*. received by the two parties, it amounts to no less than 3*l*. 13*s*. each. It seems to me that 3*l*. 13*s*. a week is an allowance for labourers which is preposterous. *Mr. Daniel* has, in one part of his evidence, admitted that he could get unskilled labour for much less, and on re-examination he said, that he could get a labourer for 30*s*. a week, which was paid in *Alston's* boats. I shall, however, be better able to form an opinion on this point from the experience of the oyster season which is now about to commence; but my present impression is, that 40*s*. per week is the utmost which can possibly be allowed; and whether I make such an allowance as that, must depend upon the information I may hereafter obtain. It appears to me from the account brought in, that *Mr. Daniel* has made a sub-partnership between himself and somebody else as to the money which he has received, and which he was bound to bring into the common stock of the meters.

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I am bound to say, that not only under the decree of the Court must I make an allowance to the Defendants, but that I am perfectly disposed to make a liberal allowance to one who has been acting upon a mistaken view of his rights, and under the directions of the Corporation of *London*. He may, under such circumstances, be very well mistaken as to what his rights and duties were. I think it right, however, at once to mention that the particular sums in the account cannot be allowed.

I will now proceed to state what it will be my duty to do in the future progress of the case in Chambers. It seems to me clear, from the decree, that the duty of the Defendants is, and I hope they will consider it so, to be and act as part of the united body of meters. They have not to look to the Corporation of *London*, or to any directions they may individually receive from the Corporation. Whatever directions the Corporation may think fit legally and properly to give to the united body, that body will of course obey, but with that I have nothing to do. The Defendants are part of this body, who are entitled jointly to divide, by immemorial custom, the general profit made by the business. They must submit to the regulations of the body,—they must take their turns in the ships appointed by the weeksman in the ordinary routine of business. I assume they will do that in the ensuing oyster season; and the Corporation of *London* will be at liberty, and probably will feel it to be their duty, to multiply notices in any shape or form they think fit, that every purchaser may be aware that he is not bound to contribute anything towards the payment of the holdsmen. Whatever the purchaser gives, will be a mere gratuity; but I think the plain course is this, that the labour should be provided for by the joint fund, and not merely in such a manner as two members of the body may think fit. The labour must be provided for on the ordinary principle of providing la-

bour in such a manner as it can be got; and the principle will be, in taking the future account, and in making just and proper allowances and payments for labour, to consider what will be the actual wages, for which fellowship-porters and sufficiently skilled workmen can be found to do the work. I shall no-doubt find that the Plaintiffs provide men in such a way as they may think best; probably, they will have to make some payments when full notice is given to the public that every payment to the holdsmen is a mere gratuity, and that all purchasers are entitled to have their oysters delivered free. But if the Defendants, *Daniel* and *Morris*, in their turns have a vessel to discharge, and the Plaintiffs shall tender to them skilled labour at a lower price than the Defendants are paying, I shall not be disposed to allow the Defendants anything more than the sum for which such skilled labour can be procured. They must consider themselves as engaged in this co-partnership, and though they will not be bound to accept any other than skilled labour, they will not be allowed out of the common fund to make arbitrary and optional payments.

The only question remaining is, whether anything should be allowed to *Daniel* and *Morris* in respect of their personal labour in the work which they have performed. I think I cannot make them any such allowance. Every one of these parties is no doubt bound to contribute equally to the labour of carrying on the work they had in hand; and if it shall in future turn out that the Defendants have to pay more men for working the other vessels, because the Plaintiffs are not persons capable of doing the labour, in that case, if *Daniel* and *Morris* choose to do the work themselves, it will be a ground for making them an allowance for their labour. At present that has not been so: on the contrary, it is manifest upon the pleadings that the other parties have contributed their whole receipts, they having found the labour gratuitously. My

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principle will be hereafter to allow, as a proper and just allowance, that for which the labour can be procured; and to allow *Daniel* and *Morris*, in respect of personal labour, only such difference as may seem to be right, having regard to what they have done, in comparison with the additional labour to be found in the other vessels, because the other co-partners do not think fit to perform the work.

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Devise of real estates upon trust to pay the rents and profits unto or to the use of *R. L.* and his assigns, for his life, and from and after his decease, unto the first and other sons of *R. L.*; and, in default of such issue, in trust for the first and other daughters of *R. L.*; and in default of such issue, to pay the rents and profits as therein mentioned; and an ultimate remainder over:—

*Held*, that *R. L.* did not take an estate tail in the devised premises, nor an estate for life, with remainder to his first and other sons successively in tail, nor an estate for life with remainder to his first son in fee.

### BRIDGER v. RAMSEY.

A SPECIAL case, for the purpose of taking the opinion of the Court upon three questions arising on the will of *Robert Lathorp*, with reference to a part of the testator's real estates, called the *West Felton Hall* estate. The will of *Robert Lathorp* was as follows:—"I give and devise all my real estates, whatsoever and wheresoever, unto my good friend *John Scott*, of *Shrewsbury*, draper, and his heirs and assigns, upon the trusts only, and to the uses, intents, and purposes hereinafter mentioned touching and concerning the same, (that is to say), in trust to pay the rents, issues, and profits of all my said real estates (the same being subject and liable to the payment of one annuity or yearly rent-charge of 20*l.* for and during the life of my sister *Martha Lathorp*, and also subject and liable to the payment of what money is secured on the said estates by mortgage), unto or to the use of my nephew *Robert Lathorp* and his assigns, for and during the term of his natural life; and from and after his decease, in trust, to pay the rents, issues, and profits of my said real estates as aforesaid, unto the first and other sons of my said nephew *Robert Lathorp*, lawfully begotten; and, in default of such issue, in trust for the first and other daughters of my said nephew *Robert Lathorp*, lawfully begotten; and, in default of such issue, in trust to pay the rents, issues, and profits

of my said real estates, as aforesaid, unto my sister *Mary Lathorp*, for and during the term of her natural life, and after her decease in trust to pay the rents, issues, and profits of my said real estates to my sister *Letitia Lathorp* for and during the term of her natural life; and, after her decease in trust to pay the rents, issues, and profits of my said real estates, as aforesaid, to my sister *Martha Lathorp*, for and during the term of her natural life; and after her decease in trust to pay the rents, issues, and profits of my said real estates, as aforesaid, unto my sister *Ann Clark*, for and during the term of her natural life; and after her decease, then in trust to and for the sole use, benefit, and behoof of my cousin *Robert Lathorp*, of *Kensington*, son of my uncle *Ralph Lathorp*, his heirs and assigns, for ever."

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 Statement.

The testator died in May, 1770. He left his nephew *Robert Lathorp*, who was then unmarried. *Robert Lathorp*, the nephew, entered into possession of the estate; and afterwards, in October 1783, died intestate, leaving *Robert William Felton Lathorp*, his only child and heir-at-law. *Robert William Felton Lathorp* suffered a recovery of the estate in 1809.

The Plaintiffs took under a conveyance of the estate made in 1815, by *Robert William Felton Lathorp*. They had contracted to sell the estate to the Defendant. It was agreed, on the discussion of the title, that the following questions should be submitted to the Court:—1. Whether, under the will of the testator *Robert Lathorp*, the nephew took an estate tail in the *West Felton Hall* estate; or, if he did not, 2. Whether *Robert Lathorp*, the nephew, took an estate for life in the said estate, with remainder to his first and other sons successively in tail; or, if he took neither of the estates before mentioned, 3. Whether *Robert*

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*Lathorp*, the nephew, took an estate for life in the estate, with remainder to his first son in fee.

*Argument.*

Mr. *Walker* and Mr. *Giffard*, for the Plaintiff, argued—First, that the son of *Robert Lathorp*, the nephew, took an estate tail general. The words “first and other son” implied succession; and they could not be fully satisfied without giving an estate tail: *Lewis* d. *Ormond* v. *Waters* (a), *Evans* v. *Astley* (b), *Oddie* v. *Woodford* (c). Secondly, the estates were not given, but it was a trust to pay the rents of the estates; and an indefinite gift of the rents amounted to a gift of the inheritance: *Stewart* v. *Garnett* (d), *Doe* d. *Dacre* v. *Lady Dacre* (e), *Ives* v. *Legge* (f). The word estate also carried the inheritance. Generally, such words would give the fee, but, considered with reference to the rest of the will, they indicated that the devisee was to take an estate tail. If the devise were construed as giving a fee, it was a construction inconsistent with succession. Even where there was a limitation, which, standing alone, would give a fee, and there was afterwards a limitation over to a party who was related to the first devisee, it was taken to be an estate tail. It was impossible to suppose that the testator could have intended, that, when there was one son, all the limitations over should fail. That construction would render all the subsequent limitations idle. A limited succession of heirs must, therefore have been intended. The second and next best view of the case was, to treat the devise as a gift of the remainder to the son of the nephew in fee: *Doe* d. *Comberbach* v. *Perryn* (g). The devise to the trustees was of a com-

(a) 6 East, 336.

(b) 3 Burr. 1570.

(c) 3 My. & Cr. 584.

(d) 3 Sim. 398.

(e) 1 B. & P. 250.

(f) 3 T. R. 488, n.

(g) 3 T. R. 484.

plete fee; then a life interest was carved out, and a trust for the son was created; and the trust to pay the rents to the son gave him the fee: *Moore v. Cleghorn* (a); 2 Jarm. Willa, 177, 179, 534, and cases there cited. The third view for which the Plaintiff contended, if he should fail on both of the former arguments, was that *Robert Lathorp*, the nephew, took an estate tail: *Robinson v. Robinson* (b), *Wight v. Leigh* (c).

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Argument.

Sir *W. P. Wood* and Mr. *Shebbeare*, for the Defendants, principally relied upon the authorities and reasoning upon which his Honour proceeded in his judgment.

VICE-CHANCELLOR:—

With respect to the first question: I think, that, both upon the words of the will, and on the cases which have been decided upon the point, it must be held that the testator intended the sons and daughters of *Robert Lathorp*, the nephew, to take successive estates, and that the construction which would give an estate tail to *Robert Lathorp*, the nephew, cannot, therefore, be maintained.

Judgment.

With respect to the second question, I am of opinion that no reasonable distinction can be drawn between this case and the case of *Lord Romney v. Foster* (d), in which the limitations to the son and sons, followed by a limitation over for default of such issue, were held to give life estates only to the sons. The word "estate" was not, it is true, in that case as in the present, contained in the particular devise to the son and sons; but the whole class of devises, of which that to the son and sons formed a part, was prefaced by that word, and it over-rode them all. There were in that case also, as in the present, express

(a) 10 Beav. 423.

(c) 15 Ves. 564.

(b) 1 Burr. 36.

(d) 11 East, 594.

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 —  
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limitations for life, with succeeding limitations introduced by the words "from and after the decease" of the tenant for life, contrasting with the words "for default of such issue," by which the limitations following on the estates of the sons were introduced; and there was likewise in that case, as in the present, an ultimate limitation in favour of a devisee, his heirs and assigns. All the arguments, therefore, which in the present case have been deduced from the use of the word "estate," the gift of the rents and profits, and the contrast of the limitations, were applicable in that case also. And that case was preceded by *Denn v. Page*(a), and *Hay v. Lord Coventry*(b), in which cases, though the reports leave us in uncertainty as to the particular words by which the property was devised, the reasoning of the Judges upon the effect of the devise is most strong and convincing. I refer particularly to the judgment of Lord *Kenyon* in *Hay v. Lord Coventry*. In answer, therefore, to the second question, I feel myself bound by these authorities to declare that *Robert Lathorp* did not take an estate for life, with remainder to his first and other sons in tail.

With respect to the third question, I think that the reasons which govern the previous questions, and particularly those which apply to the first, govern this also. And I am of opinion, therefore, that this question also must be answered in the negative.

(a) 3 T. R. 87, n.

(b) 3 T. R. 83.



1852.

## HARLEY v. HARLEY.

Dec. 20th &  
23rd.

**JAMES PLATT**, by his will, dated in 1837, after giving certain legacies and annuities, gave all the rest and residue of his estate and effects to his trustees, upon trust to permit and suffer *Anna Maria Smith* to receive the interest, dividends, and annual produce for her life; and, after her decease, upon trust to pay and apply the interest and dividends of the said residue to *John Smith, R. W. Smith, and Anna Maria Platt Smith*, for the term of five years; and, at the expiration of the term of five years, to pay the sum of 5000*l.* to *John Smith*, the sum of 5000*l.* to *R. W. Smith*, and the sum of 5000*l.* to *Anna Maria Platt Smith*; and, after payment of 15,000*l.*, payable as aforesaid, to stand possessed of the residue, upon trust to pay and apply, for the term of three years, the interest and dividends of the residue to the said *John Smith, R. W. Smith, and Anna Maria Platt Smith*, in equal shares and proportions; and, at the expiration of the last-mentioned term of three years, upon trust to pay and apply the whole of the residue unto the said *John Smith, R. W. Smith, and Anna Maria Platt Smith*, in equal shares and proportions, their heirs and assigns, for ever.

The testator bequeathed his residuary estate to trustees, upon trust to pay the interest thereof, after the decease of a tenant for life, to *John, Robert, and Ann*, for five years, and at the expiration of that term to pay them 5000*l.* a-piece, and then to pay the interest of the remainder for a further term of three years to *John, Robert, and Ann*, in equal shares; and at the expiration of that time, to pay the whole to *John, Robert, and Ann*, in equal shares. Soon after the death of the tenant for life, and before the expiration of the five years, *John* and *Robert* claimed and obtained from the trustees payment of the whole of their two-thirds of the residuary estate of the testator; but it was held, that the husband of *Ann* was not entitled to imme-

The testator died in November, 1838. His residuary estate was 40,800*l.* *John Smith* died in 1848, intestate. *Anna Maria Smith* died in 1850. One third of the 40,800*l.* was paid to *R. W. Smith* in his own right, and another third as administrator of *John Smith*. *Anna Maria Platt Smith* intermarried, after the date of the will, with the Plaintiff *John Harley*, who called for payment of the remaining 13,600*l.*; and the special case raised the

date payment of her share of the capital, and that he was unable to give an effectual release or discharge for the same.

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Statement.

question, whether, having regard to the words of the will, he was entitled to call for immediate payment of the legacy, and whether he could give an effectual release and discharge to the trustees for the same.

Argument.

Sir W. P. Wood and Mr. Whitbread, for the Plaintiff the husband, contended, that the gift to *Anna Maria Platt Smith* was in the same category as that to the other two residuary legatees, and was not subject to any restriction which was not equally applicable to them. The postponement of the full enjoyment of the legacy did not make it reversionary, or bring it within the rules applicable to the reversionary interests of married women. The case of *Whittle v. Henning* (a) went upon the circumstance, that it was a scheme or contrivance to destroy the protection which the Court afforded to the interest of a married woman. In this case, the husband sought to do no more than he was competent to do without any act or aid of any other person or instrument. The wife, and the husband in her right, had a present and immediate interest in the third share of the whole residuary estate, and there was not any rule of law which restricted such right or interest. The interest being absolute, payment ought forthwith to be made: *Josselyn v. Josselyn* (b), *Rocke v. Rocke* (c), *Doswell v. Earle* (d), and the observations of Lord Cottenham thereon (e).

Mr. W. M. James for the the Defendants, *Anna Maria Platt Harley* the wife, and the trustees, argued that the payment of the legacy to the wife ought not to be accelerated at the instance of the husband. The husband could not sever the joint tenancy (f) for the purpose of obtain-

(a) 2 Ph. 731.

(b) 9 Sim. 63.

(c) 9 Beav. 66.

(d) 12 Ves. 473.

(e) 2 Ph. 736.

(f) See *In re Barton*, supra, p. 12.

ing possession of the property of the wife. If he were permitted to do so, it would be but another mode of effecting what was attempted in *Whittle v. Henning*. The wife might survive the husband, and then disclaim all that had been done during the coverture to accelerate the payment of her legacy: *Stiffe v. Everitt* (a).

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v.  
HARLEY.  
—  
*Argument.*

VICE-CHANCELLOR:—

The intention of the testator, it is plain, was, that the legatee should receive 5000*l.* at the end of five years, and the residue at the end of eight years from the death of the tenant for life. The case is, I think, governed by that of *Stiffe v. Everitt* (a). In that case, the testator gave his real and personal estate to trustees, upon trust for his two daughters in equal shares, for their separate use during their lives, without power of anticipation, but with a power in the daughters to appoint the capital of the fund, to take effect after their death. The daughters and their husbands presented their petitions for immediate payment of the fund to the husbands, offering, if necessary, that the wives should execute a formal appointment in favour of the husbands. I lay out of consideration the state of the law at the time those petitions were presented, with regard to the effect of limitations to the separate use of females. The law on that subject has since been settled in a manner different from that which the petitioners contemplated; but Lord *Cottenham* puts the consideration of the effect of the limitation to the separate use of the daughters out of the case, and treats the question as it would stand in the absence of any such limitation. He observes, that the doubt he felt was one which the authorities cited left quite untouched, namely, with respect to the power of the husband to dis-

*Judgment.*  
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(a) 1 My. & Cr. 37.

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HARLEY.  
—  
*Judgment.*

pose of his wife's life interest, when not settled to her separate use; and the petition stood over to enable the petitioner's counsel to produce cases in favour of such a right. No such cases were produced; and Lord *Cottenham* subsequently says, "I do not see how, consistently with the cases of *Purdew v. Jackson* and *Honnor v. Morton*, any such power can exist" (a). There the direction was to pay the income to the daughters for their respective lives, and here the direction is to pay it for eight years only; but the same rule must apply to the term of eight years as to the term of life. If the husband were to die during that period, the wife would be entitled to require payment to her of the share of the residue. To the extent of any interest coming to the wife at any period during the eight years, her interest, according to the principle of that case, must be considered as reversionary. I cannot draw any distinction from the circumstance that the term is eight years only. If the postponement be good for the whole of the life of the legatee, it must be equally good for the eight years.

It has been attempted in argument to distinguish this case from *Stiffe v. Everitt*, on the ground that there is here a present and immediate interest in the whole of the property which is the subject of the legacy; and that, there being a right in the two other residuary legatees to call for payment of their shares, the same right must exist in *Mrs. Harley*. But this argument is answered by considering why the two other legatees are entitled to immediate payment. This is not because the will gives them a present and immediate interest in their shares of the capital, but because it gives them a future interest and also an intermediate one, and there is no interest outstanding in

(a) 1 My. & Cr. 41.

any other person. It is otherwise with regard to the share of Mrs. *Harley*. If her husband should die within the eight years, the future interest will be in her; and if both the husband and wife survive that term, the interest in the legacy in her right would be vested in him; and so with regard to the intermediate interest, the husband is entitled to it in right of the wife, so long as both of them live, but if he dies she will be entitled. This is, in principle, the case of *Stiffe v. Everitt*, except that the time is different. I am unable to distinguish the two cases.

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 v.  
*HARLEY*.  


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*Judgment.*

It has been said, that some doubts have been expressed with regard to the decision in *Stiffe v. Everitt*; but nothing has been done to overrule it. The Lord Chancellor, in the case of *Box v. Jackson (a)*, declines to enter into the consideration of that question (*b*); and I am bound, therefore, to follow the case of *Stiffe v. Everitt*, so long as it is unimpeached by any higher authority.

Supposing, however, that *Stiffe v. Everitt* were out of the way, I doubt much whether I could have arrived at a different decision, consistently with the authority of *Whittle v. Henning*. The will creates a joint tenancy in the wife and the other residuary legatees during the five years; and I think it is very questionable, whether, consistently with the principle of that case, the husband could have destroyed the protection which the rule of the Court affords to the right of the wife, and entitle himself to immediate payment of the legacy by severing the joint tenancy, or whether the same equity which attached during the continuance of the joint tenancy, would not attach after it was severed. If the husband could not acquire the right to immediate payment by any act of his own, it

(a) Dru. 48 (1843).

(b) Id. 83.

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Judgment.

would be perhaps difficult to say that he could do so, because the joint tenancy was severed not by his own act but by that of the other joint tenants. It is not, however, necessary to decide this point, as my opinion is, that the case is governed by *Stiffe v. Everitt*, and that both questions must be answered in the negative.

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# REPORTS OF CASES,

ADJUDGED IN THE

## High Court of Chancery,

BEFORE

SIR WILLIAM PAGE WOOD, KNT., VICE-CHANCELLOR,

COMMENCING IN

HILARY TERM, 16 VICT. 1853.

1853.

BRENAN v. PRESTON.

Jan. 12th.

THE Plaintiffs *Brenan* and others, and the Defendants *Preston* and *Watson*, were the owners of the iron screw-steamer *Phæbe*. The shares of the Plaintiffs together amounted to 52-64ths, and the shares of the Defendants to 12-64ths. By an agreement, dated the 25th of February, 1851, the other part owners jointly and severally contracted with the Defendants *Preston* and *Watson* to ap-

In a suit to carry into effect an agreement by giving the Plaintiffs relief in respect of a breach of the agreement by the Defendants, and, at the same time, on the ground of such breach, to re-

move them from an office of trust and confidence which they held by virtue of the agreement, and to appoint other persons to such office; the Court, considering the Plaintiffs entitled on an interlocutory application to the relief sought, restrained the Defendants, by interlocutory order in a supplemental suit, from prosecuting actions at law against the Plaintiffs under the agreement to recover damages for removing the Defendants from such office.

In a question on the effect of a contract in the circumstances of the case, where the Court had concurrent jurisdiction with a Court of law, and had assumed such jurisdiction by interfering to protect the rights of the parties, the Court restrained the parties to the contract from bringing actions at law founded on the facts with regard to which the Court had interfered, and in which actions the same question, of the legal effect of the agreement, in the circumstances, would necessarily arise.

A case in which the Court on an interlocutory application appointed a ship's husband at the suit of some of the part owners of a ship as against the others, who were, under a contract, ship's husbands as well as part owners.

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 —  
*Statement.*

point and irrevocably employ them "both or either" as the brokers, agents, and ship's husbands for the said steamer, with power to sue for and collect freights on behalf of the owners, and with the usual powers attaching to the acting owners or ship's husbands; and that they should be entitled to the usual remuneration of ship's husbands, brokers, and agents, in charges, interest, and commission. "No other person to be employed. In all cases of advance, *Preston and Watson* to have a lien upon the steamer for all advances, with interest at 5*l.* per cent., made by them, or a lien upon the respective profit or balance due to each part owner." And it was also thereby agreed, that, if any of the subscribing parties should sell their shares or a part thereof, except and subject to the agreement and provision for the continuance of the employment of the Defendants as ship's husbands and brokers, such parties should "pay the sum of 1500*l.* as and for compensation and liquidated damages: the remuneration of ship's husbands and agents being understood to be 30*l.* per annum *British* sterling for keeping the ship's books, and 5*l.* per cent. on all charters effected, or for loading the ship on the berth; and 2*l.* 10*s.* per cent. on all inward freights." The Plaintiff *Brennan* was, by the same agreement, appointed master on the terms therein stated. It was further thereby agreed, that, should three-fourths of the owners find that the Defendants as ship's husbands or agents, or *Brennan* as master, had committed any gross act of negligence or fraud in their respective capacities as ship's husbands or agents or master, such three-fourths of the owners in point of value should, —provided their decided and positive disapprobation was expressed in writing to the said parties, and provided they shewed the committal of any such negligent or fraudulent act prejudicial to the owners' interest, and provided they were not acting from caprice or interest,—have the power of discontinuing their services as agents



or captain, by purchasing *Brenan's* or *Preston's* and *Watson's* share, at such fair price as might be mutually agreed upon; it being mutually agreed, that, before such purchase should be effected, all the debts of the vessel should previously be paid; and that the expense of such inquiries, and all costs attached thereto or connected with the transfer of such share, should be at the cost of that three-fourths of the owners who should be dissatisfied with *Brenan* as master, or *Preston* and *Watson* as agents.

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 —  
*Statement.*

The Defendants, as ship's husbands, in September, 1851, chartered the ship to certain merchants, who were, according to the charterparty, to pay 130*l*. per week for the ship, and who, by the actual agreement with the Defendants as ship's husbands, paid them 134*l*. per week. The other part owners, on discovering, in October, 1852, the difference between the sum specified in the instrument and the sum paid, gave notice of their disapprobation to the Defendants, together with notice of their removal as ship's husbands. The Defendants explained the subject of the 4*l*. per week in a way which, they insisted, ought to be satisfactory; and they disputed the right of the other part owners to remove them from being ship's husbands, and took and retained possession of a part of the machinery of the ship which had been in the hands of the engineers for repair. The other part owners then filed their original bill, praying that the Defendants might account for their receipts and payments as ship's husbands, and might be charged with the 134*l*. a week; and that the value of the Defendants' shares (if they should desire it) might be ascertained, the Plaintiffs offering to purchase them at such value; and the bill also prayed, that the Defendants might be restrained from further acting as the ship's husbands or brokers, and from preventing, or interfering with, the sailing of the ship in pursuance of the charterparty, either by withholding or retaining the

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said machinery or otherwise; and that, if necessary, a receiver might be appointed.

The application for the injunction came by appeal before the Lords Justices; and their Lordships, on the 4th of December, 1852, restrained the Defendants from further acting as ship's husbands, agents, and brokers, of the *Phæbe*. The Plaintiffs also asked for a manager of the ship, and for an order that the machinery in the possession of the Defendants might be delivered up to such manager, on the ground, that, although the Court would not be able at the hearing of the cause to direct the whole ship to be sold, and thus to terminate the office of the manager, still there was reason for believing, that the Court would, at the hearing of the cause, be able to order restitution of the machinery to the other co-owners, and must therefore provide for its custody in the meantime. The subject in dispute was a specific chattel, in which the Plaintiffs had fifty-two and the Defendants twelve parts, and which specific chattel the Plaintiffs were entitled to have delivered and applied in conformity with their original agreement. The appointment of a manager was also asked for, on the ground, that it flowed necessarily from the interim order which the Court had made; for, by restraining the Defendants from acting as ship's husbands, it became necessary to make an interim provision for the management by some other person, or the property would be left derelict. Their Lordships, however, ordered the residue of the motion to stand over, without prejudice to any question, and with liberty to apply; and ordered, that the Plaintiffs should be at liberty to take such proceedings in the Court of Admiralty, with respect to the machinery or otherwise, as they might be advised.

On the 13th of December, 1852, application was again made by the Plaintiffs to the Lords Justices; and their

Lordships expressed their opinion to be, that the matter stood in one of two positions—that, either by reason of the possession of the hull by the Plaintiffs, the Court of Admiralty could not interfere with respect to the machinery, or that, according to the constitution and forms of that Court, relief could not be given until a comparatively distant day; and their Lordships were of opinion, that, in either view, this Court had jurisdiction. If the Court of Admiralty had jurisdiction, then this Court might interfere as ancillary to it, as in the appointment of a receiver pendente lite and other cases. Further evidence was also produced, which the Court thought material, as shewing, that the Defendants, as ship's husbands, had committed a breach of duty and abandonment of trust,—namely, that the Defendants had withdrawn the machinery from the place where it had been deposited for the purpose of repairs before such repairs were completed, with the view of obtaining possession as against their co-owners. The order made by their Lordships was:—The Plaintiffs undertaking to be answerable for the full value of the machinery and of the Defendants' share of the vessel, and to abide by any order respecting their shares of the machinery and vessel which the Court shall make—Let a receiver and manager of the machinery be appointed in the usual way; and provisionally, until the appointment of a receiver shall be completed by the *Vice-Chancellor*, let the Plaintiff *Brenan* be appointed receiver and manager of the machinery; and let the machinery be delivered to him accordingly within four days; all the Plaintiffs undertaking, that *Brenan* shall faithfully execute the duties, and that, upon the completion of the appointment of receiver by the *Vice-Chancellor*, the machinery shall be delivered to him, if the Court should so order.

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Statement.

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In January, 1853, the Plaintiffs filed their supplemental

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Statement.

bill against *Preston* and *Watson*, stating, that, immediately after the order of the 4th of December, 1852, the Defendants commenced several actions in the *Exchequer of Pleas* against the Plaintiffs, for the sum of 1500*l.* as liquidated damages, under the agreement of the 25th of February, 1851, for the alleged wrongful removal of the Defendants from being ship's husbands, agents, and brokers; and also an action against the Plaintiff *Brenan* on an agreement of the 25th of January, 1851, whereby *Brenan* had contracted, that if he should appoint any person other than the Defendants to act as his brokers or agents for the vessel, he would pay the Defendants 1500*l.* as liquidated damages for the breach; and the Defendants alleged that the Plaintiff *Brenan* had broken such agreement by appointing Messrs. *Papaganni & Mussibini* as such agents. The bill alleged that the agreement of January was only preliminary to that of February; and that the appointment of other agents was absolutely necessary after the Defendants had been removed by the order of the Court. The bill charged that all the questions under the agreement could and ought to be tried in this Court; and it prayed that the Defendants might be restrained from proceeding with such action.

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Argument.

Mr. *Follett* and Mr. *W. M. James* moved for the injunction.

Mr. *Rolt*, Mr. *Prior*, and Mr. *Burnie*, opposed the motion, and contended that the question was purely a legal question, and the jurisdiction of this Court only ancillary; and that being so, that the present application was not, that the question between the parties might be determined by the proper tribunal, but that this Court would interfere to restrain the Defendants from proceeding in a Court of law to determine the legal right. Such an application was without any precedent or authority, and entirely contrary to the

principle on which this Court proceeded in dealing with questions of law. [*Vice-Chancellor*.—Take the case of a bill for specific performance,—would the Court in that case, taking cognizance of the question, yet allow an action to be brought?] The Court would not prevent a purchaser, who denied the validity of a contract, from proceeding at law to recover back his deposit. The Court in this case would do no more than preserve the property pending litigation, and would not restrain the Defendants from asserting a legal right; but, on the contrary, would have put the question in a train for legal determination, if the Defendants had not happened to possess the means of trying it without the aid of the Court.

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Argument.

VICE-CHANCELLOR:—

It appears to me that the bill partakes more of the nature of a bill for carrying into effect an agreement, or for the specific performance of an agreement, than of a bill raising the question of fraud in any other shape than as giving effect to this particular agreement. The question of fraud arises rather in this shape, that the parties who bring forward the case say, the fraud has been so made out as to give them rights under this agreement to displace the Defendants from the office of ship's husbands, on the terms which the bill offers, of purchasing their shares. How the case might have stood if an action had been brought, in the first instance, for the 1500*l.*, whilst no bill was pending in this Court, it is not necessary to consider. A bill has been filed here to carry into effect the agreement of February, 1851, and a question has been brought before the Court, on an interlocutory application, it is true,—and the Court has had to consider what course was to be taken with reference to acts of the Defendants, so far as the case has hitherto proceeded, and, no doubt,

Judgment.

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BRENAN  
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—  
*Judgment.*

without coming to any final conclusion on the subject. One of the objects, indeed the main object, of that interlocutory application, was the protection of the property until the question upon the agreement could be decided in this Court. The case is one in which, as it appears to me, there is a clear concurrent jurisdiction of the two Courts. The bill is filed for the purpose of having the aid of this Court in carrying into effect the rights of the Plaintiffs; and it is not until after the filing of the bill, and after the matter has been discussed in Court—when it was open to the Defendants to contend that interlocutory relief should not be given until the parties had proceeded to try their rights at law,—and it is not until after the result of the interlocutory application has been ascertained, (but, no doubt, after intimation has been given to the Court that such proceedings would take place), that the actions are commenced.

It was argued, and I agree with the argument, that in a case where there is not a concurrent jurisdiction, but where the remedy is entirely and merely ancillary—for instance, in the cases of a copyright or patent, the Court will always have the right ascertained at some period, in the fittest manner, by proceedings at law; but I think this is not a case in which the remedy is simply and merely ancillary. It is in the nature of a suit for specific performance of the agreement between the parties—it is a case requiring an account arising from that agreement. I cannot agree with the suggestion, that the question of the 4*l.* per week would arise in the ordinary and common course of taking the accounts, unless some special directions were given on the subject. The result of the whole case will be, when the cause comes to a hearing, supposing the case of the Plaintiffs to be established, that these accounts will be directed, the Defendants will be removed, and the Plaintiffs

will obtain the full benefit of that account which they ask in reference to that which they allege to be the fraud so committed on them.

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 Judgment.

Having therefore come to the conclusion that this is a case of concurrent jurisdiction, I then ask myself whether there is any instance in which the Court, when once possessed of a cause in which there is concurrent jurisdiction, will, except for its own convenience, allow an action to be brought on the part of the Defendant to try the very same matter as to which issue has been raised by the Plaintiff before the filing of the bill? I suggested the case of specific performance as one in point; and I have never known an attempt made to try the case at law,—the vendor filing a bill for specific performance, and the Defendant bringing an action for recovery of his deposit. I think there can be no question as to what course the Court would take if such an action should be attempted in that case, unless the Court found it desirable, for any special reason, to allow the action to proceed. There can be no doubt, that, generally, the action would not be permitted to proceed while the Court was in possession of the cause. In this case, so far from its being convenient, I know of nothing that can be more inconvenient than to allow several actions to proceed for the purpose of determining those rights which are capable of being determined in one suit, the Court having all the parties before it. I should have thought so before the passing of the recent Act(a); but the recent Act, I will not say renders it imperative, but it certainly does suggest to the Court a line of duty, which I should be entirely disposed to comply with, by way of analogy to what the scope and purport of the Act appears to be, namely, that as far as possible this Court should determine all the questions that arise in a suit before it, instead of sending

(a) See 15 & 16 Vict. c. 86.

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 —  
*Judgment.*

the parties from a Court of equity to a Court of law to have a portion of the case decided, and then bringing them back to have the remaining fragments of the case disposed of (a). Here, if these actions should proceed, the parties will try them at a great expense; and when they are tried, the Plaintiffs have still a perfect right to go on and examine the same witnesses, and to arrive at some conclusion in this Court, which possibly might, I do not say it would, be at variance and conflict with the decision which might be come to by the Court of law. That would be any thing but a convenient mode of dealing with the case.

The sections I refer to are the 61st of the recent Act (b), which provides, that cases shall not be sent to Courts of law for their opinion; and the 62nd, which says, that "in cases where, according to the present practice of the Court of Chancery, such Court declines to grant equitable relief until the legal title or right of the party or parties seeking such relief shall have been established in a proceeding at law, the said Court may itself," it does not say it necessarily must do so, but "may itself determine such title or right without requiring the parties to proceed at law to establish the same." There appears to me, therefore, on the construction of this Act, no difficulty in saying, that the Court, having jurisdiction in these cases, such jurisdiction being concurrent with that of a Court of law, may assume to itself the whole authority; and if am not prevented from doing so, there is every reason why I should act in this case so as to enable the parties to determine in one simple—and, as it appears to me, looking to the nature of the motion, by far the more expeditious—form the particular rights of the parties in this case. The ultimate result, when the cause comes to be heard, cannot of course

(a) See sections 61, 62.

(b) 15 & 16 Vict. c. 86.



depend on whether the one course of proceeding or the other has been adopted.

The only material observation that has been suggested is, that detriment may arise to the Defendants if the actions should be stayed and the suit should be abandoned. If the suit be abandoned the injunction would fall, and the actions might proceed; and, unless it is suggested there might be some possible inconvenience from evidence being lost, I do not see any probability of damage arising either from the abandonment or determination of this suit, or any such injury as to induce me to say the Defendants ought to be permitted to continue in a course that seems to me so highly objectionable and inconvenient. Looking, therefore, to all that is asked on the part of the Plaintiffs, which is simply this, that the Defendants may be restrained from proceeding with the actions and from taking any other proceedings at law in respect of their removal as ship's husbands, agents, or brokers, I do not see that any such evil as has been suggested can arise from the Defendants being restrained to that extent.

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v.  
PRESTON.

*Judgment.*

1853.

Jan. 17th.

## NICHOLS v. HAWKES.

The 28th section of the Wills Act, (7 Will. 4 & 1 Vict. c. 26) which enacts, that, "where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of," applies to the devise of an existing estate or interest, and not to an estate or interest which the testator, by his will, creates *de novo*; and therefore a gift by will since the statute, of an annuity to A., without words of limitation, but which was by the same will charged upon real estate, is not a devise of a perpetual annuity or rent-charge, and is a gift of an annuity for life only, as it would have been before the statute.

THE case arose on the will of *G. Turner*, dated the 12th of February, 1838, which was in the following words: "First. I give and devise all that my messuage or tenement, with the appurtenances, called or known by the sign of the *Montford Arms*, with the closes, pieces or parcels of land or ground to the same belonging, situate in *Horseheath*, in the said county of *Cambridge*, with their appurtenances, and all other my real estate whatsoever and wheresoever, unto and to the use of my great nephew *W. E. Turner*, his heirs and assigns, for ever, subject, nevertheless, to the payment of the two several annuities and of the legacy hereinafter mentioned, viz. one annuity or annual rent-charge of 10*l.* to *Mary Turner*, the mother of the said *W. E. Turner*, and one other annuity or annual rent-charge of 10*l.* to my nephew *Isaac Turner*. And I do hereby declare my will to be, that the same two several annuities shall be paid without any deduction whatsoever, by two equal half-yearly payments in every year, the first half-yearly payment thereof respectively to be made at the expiration of six calendar months next after my decease." The testator then gave powers of entry and distress for the recovery of the annuities, if in arrear. And he further charged the devised estates with the payment of the sum of 200*l.* to his great nephew *George Turner*, and bequeathed the same legacy to him accordingly, and directed it to be paid at the end of six months after his death. The testator then bequeathed his furniture to his sister *Sarah*, and directed an inventory to be taken of the same and signed by her; and gave his residuary personal estate to his executors, upon trust to invest the same, and pay the interest and dividends to his sister *Sarah* for her life, and after her decease he directed certain other annuities to be paid for the

lives of the annuitants therein named, and disposed of the ultimate residue of his personal estate.

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The Defendants were purchasers from the mortgagee of *W. E. Turner*, with power of sale, and objected to complete the contract, on the ground that the two annuities of 10*l*. were annuities in fee, and not merely for the lives of the annuitants; and the question in the special case was, whether the Defendants could sustain the objection.

Mr. Prior for the Plaintiff.

Argument.

Mr. Rogers, on the part of the Defendants, argued, that there was nothing to limit the annuities given to *Mary* and *Isaac* to a life estate. On the contrary, by the 28th section of the Wills Act (a) the Court was bound to construe the gift to the annuitants as passing the fee simple, unless a contrary intention appeared. In this case certainly no contrary intention appeared; for in other cases, in which the testator had given annuities for life, he had distinctly expressed that intention.—The cases cited were *Savery v. Dyer* (b), *Stokes v. Heron* (c), *Potter v. Baker* (d), *Blewitt v. Roberts* (e), *Kerr v. The Middlesex Hospital* (f).

VICE-CHANCELLOR:—

I think the 28th section of the Wills Act clearly applies, and can be applicable only to the case of a devise of real estate, which exists and is vested in the testator at the

Judgment.

(a) 7 Will. 4 & 1 Vict. c. 26.

(b) Amb. 139.

(c) 12 C. & F. 161.

(d) 13 Beav. 273.

(e) 3 Cr. & Ph. 274. See *Yates v. Madden*, 3 Mac. & G. 541, per Lord Truro.

(f) 2 De G., Mac. & G. 576.

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time of his death, of which he has then a disposing power; and that it does not apply to the case of a particular estate, which the testator is about to create for the first time by his will. The words of the statute are: "that where any real estate shall be devised to any person without words of limitation, such devise shall be construed to pass the fee simple." It appears to me that these words are not sensible, if they are referred to some new interest which the testator intends to create by his will, and are not construed with reference to some interest already existing. The statute goes on, "to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of." These words must refer to something absolutely vested in the testator, or over which he has a power of disposition. This is the rational distinction, and it is that which is taken by Lord *Hardwicke* in *Savery v. Dyer* (a). Having regard, therefore, to this distinction,—if a testator had vested in him a rent-charge in fee simple, or a fee-farm rent, the statute would have applied, and a gift of that fee-farm rent or rent-charge, without words of limitation, would have carried it over; but as Lord *Hardwicke* said, if an annuity be created *de novo*, it is different. According to all the cases, down to the case of *Kerr v. The Middlesex Hospital* (b), the gift of such an annuity, without any further limitation, confers only a life interest. Now here, by the words of the will, the real estate is given to *W. E. Turner* in fee, but it is given subject to the payment of two several annuities to the parties named. It was argued, on the part of the defendant, that if the testator had given the whole of the rents and profits of the estate, it would have passed the fee; and that it was unreasonable to say, that, because he gave a portion only of the rents and profits, the devisee should not have the fee in that portion. The answer is this: if the testator

(a) Amb. 139.

(b) 2 De G. Mac., & G. 576.

gave the whole rents and profits, he would, under the Wills Act, give the whole estate vested in him; but when the testator creates a rent-charge of this description, he creates and devises an entirely new estate; and I find nothing in the words of the section which enlarges the operation of the gift beyond the extent of the estate which they would have conferred upon the devisee by the rule of law, as it existed before the passing of the Act. I must hold, therefore, that it is not such an objection as the purchaser can insist upon as a ground for refusing to complete the contract.

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 —  
*Judgment.*

### BERNASCONI v. ATKINSON.

THE question arose upon the will of *Bartholomew Bernasconi*, dated the 14th of April, 1852, whereby he devised his freehold and leasehold premises therein mentioned, and his residuary real and personal estate, to *Atkinson* and others (his executors), upon trust to sell such as should be saleable, and to stand possessed of the proceeds and the other his residuary personal estate, upon trust to pay to the several persons therein respectively named the lega-

*Jan. 14th &  
 18th.*

A gift by the testator to his first cousin, *Vincent B.*, the son of his late uncle *Peter B.* The testator had no cousin named *Vincent B.* who was the son of his late uncle *Peter*; but he had a first cousin

named *George Vincent B.*, who frequently visited and dined with him, whom he commonly called "*Vincent*," and who was the son of a deceased uncle named *Joseph*. The son of *Peter* was named *Frederick*, and was not in the habit of visiting the testator. The Court admitted evidence of these extrinsic circumstances, and held, that the testator was mistaken in the description rather than in the name of the legatee; and that *George Vincent B.*, the son of *Joseph*, was entitled to the legacy.

Held, also, that the evidence of the solicitor who prepared the will, that the testator had by his instructions expressly indicated that *George Vincent B.* was the person for whom the legacy was intended, and that he (the solicitor) had inserted the description without the direction of the testator, and in a mistaken belief of the parentage of the legatee, was not admissible.

Where a legatee is pointed out by name and description, and there is no person to whom the name and description both apply, but the name only applies to one and the description only applies to another, the Court will endeavour, from such of the extrinsic circumstances as are admissible, to ascertain the person meant by the testator, and will not hold the bequest void for uncertainty, except in cases where it is impossible to discover any preponderance in favour of one of the persons rather than of the other.

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 }  
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 v.  
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 —  
*Statement.*

cies therein mentioned, and amongst others, a legacy given in the following words: "To my first cousin *Ann Bernasconi*, the daughter of my late uncle *Peter Bernasconi*, a legacy of 2000*l*." And the testator bequeathed his residuary estate as follows: "Unto my sister *Jane Ann Blackwell* (the wife of Mr. *Thomas Blackwell*), and my first cousin *Vincent Bernasconi* (son of my said late uncle *Peter Bernasconi*) equally to be divided between them, share and share alike." And the testator directed his sister to pay out of her moiety an annuity of 20*l* unto his aunt *Frances Mapleson* during her life, in lieu of the like annuity bequeathed to his said aunt by his late father's will.

The testator died in May, 1852. The father of the testator had six brothers, three of whom died in childhood, and one without issue, many years before the testator. Of the other two, one was named *Peter Alexander Bernasconi*, and the other *Joseph Vincent Bernasconi*. *Peter Alexander Bernasconi* died some years before the testator, leaving two sons, *Alexander*, who had gone abroad and had not been heard of for eleven years, and *Frederick*, a Defendant in this suit; and leaving a daughter *Ann*, the legatee named in the will. *Joseph Vincent Bernasconi* had also died before the testator, leaving three sons, one of whom, the Plaintiff, *George Vincent Bernasconi*, was living at the date of the will; the two others, *Charles* and *Joseph*, having died several years before.

The Plaintiff *George Vincent Bernasconi* claimed to be entitled to the moiety of the residuary estate, as the legatee meant by the description "my first cousin *Vincent Bernasconi*, son of my late uncle *Peter Bernasconi*." He founded his claim upon several grounds:—1. That there was not at the date of the will any member of the testator's family of the name of "*Vincent Bernasconi*," and none other than the Plaintiff bearing the name of "*Vin-*

cent," and that the Plaintiff was commonly called "*Vincent*," and had always been so addressed by the testator. 2. That *Peter Alexander Bernasconi*, the uncle, never had a son of the name of "*Vincent*." 3. That the Plaintiff was on intimate terms with the testator, and was in the habit of frequently visiting and dining with him. 4. That the Defendant *Frederick*, the son of *Peter Alexander*, was not in the habit of visiting the testator.

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ATKINSON.  
—  
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The Plaintiff also put forward another as a fifth ground for the conclusion that he was the party meant: that the solicitor by whom the will was prepared, was under the impression that the Plaintiff was the brother of the legatee *Ann Bernasconi*; and that in such belief the solicitor inserted the erroneous description "son of my late uncle *Peter*" without any directions from the testator; and moreover, that the testator had particularly described the Plaintiff, by referring to his person and place of business, in answer to an inquiry by the solicitor, as to who the testator meant by *Vincent Bernasconi*. The evidence tendered in support of the fifth ground, on which the Plaintiff rested his claim, was however rejected.

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Mr. *Rolt* and Mr. *C. Barber* for the Plaintiff.

Argument.

Mr. *Tripp*, for the Defendant *Frederick*, the son of *Peter Alexander*.

Mr. *Freeling*, for the heir-at-law and next of kin of the testator; and Mr. *Dauney* for his widow.

The authorities cited in the argument are referred to in the judgment.

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ATKINSON.*Judgment.*

VICE-CHANCELLOR:—

The principal question in this case is, whether, from an impossibility in determining the meaning of the testator, the Court is to hold that there is an intestacy—that being the last conclusion to which the Court will resort. It is doubtless of very great importance to adhere to the rule of the Statute of Frauds; and, therefore, I was anxious to consider to what extent, consistently with that rule, parol testimony could be received in this case. It will be found laid down as a rule, that the only case in which evidence can be admitted to shew the intention of the testator, is where the description of the matter bequeathed, or of the legatee, is applicable equally to two things or to two persons. Where, as Lord *Coke* says, the evidence “stands well with the words of the will.” A second rule may be thus stated: if the description contained in the will be not strictly applicable to any matter or person, the matter of the legacy, or the person of the legatee cannot be ascertained by any parol evidence of the intention of the testator; but the Courts have a right to ascertain all the facts which were known to the testator at the time he made his will, or (as it has been expressed,) to place themselves in the testator’s position, in order to ascertain whether there exists any person or thing to which the description can be reasonably and with sufficient certainty applied,—the presumption necessarily being, that the testator intended some existing matter or person. These canons, for the admission or exclusion of extrinsic evidence, are established in Sir *James Wigram’s Examination of the Rules of Law on the subject* (a). We are always bound to assume, that the language of the will is the language of the testator. In this case, the evidence of the solicitor who prepared the will was tendered, to prove that the description of the legatee was introduced by him and not by the testator.

(a) 1840, 3rd edit.



That species of evidence clearly cannot be admitted. In truth, there is no doubt that generally the language of the will is not originally that of the testator, but is proposed to him by his professional adviser; but he adopts it, and the words of the will must, therefore, be taken to be those of the testator. The language must also be construed in its natural sense, if that construction be possible. If the extrinsic circumstances do not raise a case in which the words used are applicable equally to different persons or things, evidence of intention cannot be received. If, however, the description be not strictly applicable to any person or thing, but is applicable partly to one person or thing, and partly to another, the Court will not necessarily hold that there is an intestacy. The Court may in that case endeavour to ascertain whether there is another sense, sometimes called a popular sense, in which the words may be understood, and for this purpose will inquire into the habits of the testator, and the circumstances which surrounded him at the time he made his will. In this case (taking the son of *Peter* not to have been heard of for many years, and to be wholly out of the testator's mind, which is putting the case most favourably to the Defendant *Frederick Bernasconi*), the Court has to consider, whether, under a description not strictly applicable to either of two persons, but part of which is fitted to one and part to the other, it can arrive at the conclusion, that the testator intended to bequeath the legacy to one or to the other. In applying the rule, that, in such a case, the Court is bound to ascertain, if possible, who is the person intended, there are some late cases which have gone very far,—further, it has been thought, than could perhaps be reconciled with principle (*a*). Upon this point it has been said in a recent judgment, that “where the description is partly true as to both claimants, and no case

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(*a*) See *Doe v. Hiscocks*, 5 M. & W. 369.

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 —  
*Judgment.*

of equivocation arises, what is to be done, is to determine whether the description means the lessor of the plaintiff or the defendant. The description in fact applies partially to each, and it is not easy to see how the difficulty can be solved. If it were *res integra*, we should be much disposed to hold the devise void for uncertainty; but the cases of *Doe v. Huthwaite*, *Bradshaw v. Bradshaw*, and others, are against this conclusion (a)."

In *Lord Camoys v. Blundell* (b), Lord Brougham, though disposed to differ from the decision which had been come to, and which was affirmed by the House of Lords, says, "It has always been a nice point, where there has been an instrument of any sort, be it a gift or settlement or bequest (but particularly in case of a bequest), and where the result appears to depend on one of two things, which things affect the subject matter of the gift, settlement, or bequest, in so far as it is necessary to affirm who the person is to take, it has always been a matter of great nicety, to ascertain in what way you are to steer between these two points, namely, where there is a name given and a description given, and where the name may be right and the description may not apply to the person, or where, on the other hand, the description may apply and the name may not answer: that has always been a question of great nicety, and has often become one of great difficulty. For instance, take the case of a gift to *A. B.* the eldest son of *C. D.*, and there exists an *A. B.* a second son of *C. D.* to take, there apparently the name is right. But *A. B.* is the second son of *C. D.*, and consequently he must take as *A. B.* if he take at all, and he cannot take as the eldest son of *C. D.*, inasmuch as that demonstratio personæ or description does not apply to him, he being the second son of *C. D.*: that is quite clear. You are then left to choose between

(a) See *Doe v. Hiscock*, 5 M. & W. 372. (b) 1 H. L. Cas. 778.

the two, and you are to satisfy yourself, as a general rule, in the best way you can, whether you will apply the one or the other of these tests to discover the meaning of the gift as regards the important point, who shall take under it, namely, whether you will go by the description and not the name, or by the name and not the description, seeing that you must elect to abide by the one or the other (a)." Lord *Brougham* here puts the case in the strongest form against admitting an intestacy, and, it would seem, would not adopt that conclusion, if any preponderance in favour of one rather than another meaning could be found. I think there are, in the present case, means of determining which portion of the description of the legatee is to prevail, for the name in fact is only a description. Is a testator more liable to err when he describes the legatee by name, or when he attempts to point him out further by some adjunct? I have referred to the cases of *Lord Camoys v. Blundell* (b) and *Doe v. Hiscocks* (c), both of which, though strong cases against the admission of evidence of intention, yet come to the conclusion that the Court could ascertain the person designated by the testator, and that the devise was not void. This is also exemplified in the cases of *Doe v. Huthwaite* (d), *Bradshaw v. Bradshaw* (e), and *Adams v. Jones* (f). The case of *Ryall v. Hannam* (g) was one of the strongest of all, for there the gift was "to *Elizabeth Abbott*, a natural daughter of *Elizabeth Abbott*, of G., single woman, who formerly lived in the testator's service," when there was in fact no such illegitimate daughter. *Elizabeth Abbott*, the mother, had married, and had legitimate children, yet the Court held that the legatee intended by the testator was a natural son, who was named *John*.

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 Judgment.

(a) 1 H. L. Cas. 792.

(b) Id. 778.

(c) 5 M. & W. 363.

(d) 3 B. & Ald. 632.

(e) 2 Y. & C. 72.

(f) 9 Hare, 485.

(g) 10 Beav. 536.

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 —  
*Judgment.*

The Court having in such cases gone so far to avoid an intestacy, the question is, whether I cannot, under this will, aided by evidence of the circumstances surrounding the testator, satisfy myself either that it was *Vincent Bernasconi*, the person named, or that it was *Frederick Bernasconi*, described as the son of *Peter*, who was intended by the testator. It certainly does appear, singularly enough, that the description of the legatee has, in most of the cases referred to, prevailed over the name. Thus, in *Adams v. Jones* the description of "wife," and in *Bradshaw v. Bradshaw* the description of second son, were held to designate the respective legatees. In *Doe v. Huthwaite*, also, the name of the legatee was wrongly expressed, and the description of second son determined the title to the legacy. The selection of the second son shewed that the attention of the testator was directed to that description of the object of his bounty, although the name was misplaced, the name of the third son being mentioned in priority to that of the second. So again in *Lord Camoys v. Blundell*, the gift was to a person not named, but described as the second son of *Edward Weld* of *Lulworth*, although there was no such person as *Edward Weld*, the possessor of *Lulworth* being *Joseph Weld*. There, the description of "second son" prevailed, and was held to designate clearly the second son of *Joseph*. *Lady Stourton* was mentioned as one of the sisters of *Edward Weld*. She was a sister of *Joseph*, and the only person answering the description was the second son of *Joseph*. But, although this has happened in those cases, they do not say, "take the description in preference to the name." Far from it: the principle of the cases is, that where there are two descriptions—where the testator specifies in two different ways the object of his bounty, the Court adopts that which, in each instance, appears to be the least open to error.

Now, in the present case, it does not appear by anything

in the will, or in the circumstances of the family, that the intention of the testator was directed to the fact of the legatee being the son of any particular individual. He is described as his (the testator's) first cousin; and though to this is added the further description, that he is the son of his late uncle *Peter*, there is nothing which tends to shew that the legatee was selected because he was the son of *Peter*. There are no circumstances to shew that the testator had any especial affection for his uncle *Peter*, or that he was better or more intimately acquainted with him than with any other uncle. There is nothing to shew that the testator selected the legatee because he was the son of one uncle rather than of another. It is a case in which the testator may be taken to have considered the particular individual to whom he made the gift, rather than to have directed his attention to the circumstances surrounding that individual. Where a testator speaks of the second son, it is reasonable to suppose he has that distinction in view; if he mentions the wife of a particular person, he may well be considered as looking to the fact that she sustained that character; and where you find the description "first cousin," which would be the case whatever uncle he had descended from, it suggests the thought that the testator might have had regard to that relationship, rather than to the parentage of the party.

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 Judgment.

As militating against this view of the case, it is observed that the testator has given a legacy to *Ann*, the daughter of *Peter*, and it was argued that it would appear therefore that he regarded *Vincent* and *Ann Bernasconi* as brother and sister. Even if it be so, we can only come to the conclusion that the testator has made an error in the name. It is part of the case that a mistake has been made, and the Court is bound to see whether the mistake is in the name or in the parentage of the legatee. When we come to look at the extrinsic circumstances which the Court is

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—  
Judgment.

at liberty to regard, I think it is plain, and I cannot conceive that any jury, to whom the question might be submitted, would entertain a doubt, that the plaintiff is the person whom the testator meant. I find by a letter which is put in evidence, that the testator addressed the Plaintiff by the name of "*Vincent Bernasconi*." I am entitled to look at the letter for this purpose, but not to ascertain the intention of the testator. I find again that both the Defendant *Frederick Bernasconi* and the Plaintiff were living in *London*, but that the Defendant was not in the habit of visiting the testator, whilst the Plaintiff was a frequent visitor at his house, and upon his invitation. These circumstances I am entitled to look at, and I hope I have not allowed my mind to be biassed by any other of the facts which have been tendered in evidence; but I am entitled to take notice of the fact, that, with one of the parties, the testator was in constant communication, and with the other he very rarely had any communication. The Plaintiff is correctly described so far as the name of *Vincent* goes, but incorrectly so far as he is described as the son of *Peter*; whilst on the other hand there was no possible reason for calling the Defendant by the name of *Vincent*. I cannot in such circumstances doubt that a jury, compelled to come to some conclusion as between the two claimants, would find that the Plaintiff is the person to whom the legacy is given.

I have hitherto supposed that another son of *Peter*, who had gone to *Russia*, was wholly forgotten by the testator, and that only one son of *Peter* could possibly have been in his view. I do not know that I am entitled, in favour of the Defendant, to assume that this was so; but I have, in doing this, taken the case in the strongest manner in his favour; for it would be much more difficult to hold that it was not *Vincent Bernasconi* who was meant, but some one of the two sons of *Peter*.

Upon the whole case, I am of opinion that it is less likely that the testator was mistaken in the name of the legatee than in some circumstance connected with him; and that I must therefore declare that the Plaintiff is entitled to take under this bequest.

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v.  
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Judgment.

TIBBITS v. PHILLIPS.

Jan. 29th.

THE Plaintiff *Tibbits* and the Defendants *John and Edward Phillips* were brewers at *Wisbeach*, under a partnership deed, dated in 1835, and duly executed by all the partners, which recited that they had recently purchased the brewery, and divers freehold, copyhold, and leasehold estates in *Norfolk, Cambridge, Lincoln*, and elsewhere, and provided that the rents of the several estates so purchased jointly by the said parties should be considered as part of the partnership stock, and, before any division of the profits should be made, all the rates and taxes, and the cost of repairs, and all other expenses, should be paid; and immediately upon and after such payments and deductions, and before such division of profits, there should be set apart such a sum of money as would satisfy the interest of 5*l.* per cent., upon not only the capital employed in the partnership, but also on the purchase of the brewery and estates, and which sum, so set apart, should be appro-

Articles made between three partners directed that the real and leasehold estate of the partnership should be treated as partnership stock, and that, before any division of profits, the rates, repairs, &c., should be paid, and 5*l.* per cent. interest set apart on the capital, and be paid to the partners in the proportions in which they had advanced it. They afterwards purchased other estates, the purchase-money of which was, by the con-

veyances, expressed to be paid by the three partners in equal proportions. The partners subsequently executed a deed, reciting the fact, that the purchase-money had been wholly paid by two of the partners, and declaring, that, until the third partner should pay into the partnership capital a sum equal to that paid by each of the other partners, he should stand possessed of the undivided third part of the estates in trust for them (the other two partners). Upon the dissolution of the partnership, the third partner not having paid any portion of his capital, the Court *held* that the real and leasehold estate was nevertheless part of the partnership capital, and that the effect of the declaratory deed was to charge the legal interest of the third partner by way of mortgage with the proportionate share of the capital which he ought to have advanced.

*Held*, also, that, in the interim, after a dissolution, and whilst the affairs of the partnership were being wound up, the third partner had ceased to be entitled to the benefit of a provision in the articles allowing him a salary, and the occupation of a house belonging to the partnership as managing partner; and that a receiver must be appointed.

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Statement.

priated and paid to the parties entitled to such interest, in proportion to the sums advanced by them respectively. The capital of the partnership was wholly contributed by *Tibbits* and *John Phillips*; and divers other freehold, copyhold, and leasehold public-houses were purchased by them, on behalf of the partnership, after the date of the partnership deed, which were by the conveyances to the partners expressed to be paid by the three partners in equal proportions. By a deed, dated the 15th of November, 1839, executed by the three partners, after reciting that the purchase-monies for the several freehold, copyhold, and leasehold estates purchased by the partnership were advanced and paid by *Tibbits* and *John Phillips* in equal shares, it was agreed and declared, that, until *Edward Phillips* should advance and pay into the partnership capital a sum equal to the sums paid by his partners, he (*Edward Phillips*), his heirs, &c., should stand possessed of the said undivided third part of the said estates upon trust for *John Phillips* and *Tibbits*, their heirs, executors, administrators, and assigns, as tenants in common; and *Tibbits* and *John Phillips* covenanted with *Edward Phillips*, that in case he should, in compliance with the partnership agreement, pay or contribute to the stock of the partnership a sum proportionate to the capital of *Tibbits* and *John Phillips*, he should then be absolutely entitled to the interest which had been conveyed and assigned to him in the property so purchased.

The bill was filed by *Tibbits* against *John* and *Edward Phillips*, for a dissolution of the partnership, and it stated, that *Edward Phillips* had not contributed any portion of the purchase-monies of the property, and that he was indebted to the partnership.

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Mr. *Rolt* and Mr. *Karslake*, for the Plaintiff *Tibbits*, claimed the real and leasehold estates of the partnership as belonging exclusively to him and *John Phillips*, to the exclusion of *Edward Phillips*, who had not paid any part of the purchase-money, and, therefore, according to the deed of 1839, was merely a trustee of his undivided share for the other partners.

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—  
Argument.

Mr. *Baily* and Mr. *Bevir* for the Defendant *John Phillips*.

Mr. *Follett* and Mr. *Osborne*, for the Defendant *Edward Phillips*, contended, that either the two other partners ought to be charged in the account with the sums of money applied out of the partnership funds in the repair of the real and leasehold premises, or that such premises ought to be treated as part of the general partnership estate.

The VICE-CHANCELLOR was of opinion, that the deed of November, 1839, did not, in effect, alter the terms of the partnership articles with reference to the joint title of the three partners to the partnership estates. It amounted, in substance, but to a mortgage of the legal interest of *Edward Phillips*, to secure payment of his proportion of the purchase-moneys or unpaid capital to the other copartners, subject to redemption upon such payment. The circumstance, that the conveyance of the purchased estates, executed by all parties, expressed that the purchase-money had been paid by the partners in equal shares, was a sufficient reason for the execution of the deed of November, 1839, in which the true facts were stated, without rendering it necessary to suppose that it was intended by that deed to make a variation in the partnership contract.

Judgment.

DECLARE that the freehold, copyhold, and leasehold estates men-

Minute.

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 —  
*A Minute.*

tioned in the deed of November, 1839, form part of the partnership property. The usual declaration of dissolution, and direction to take the accounts. Direct the estate and effects of the partnership to be sold; the sale to be conducted by some person to be appointed by the Court, and the partners to have liberty to bid.

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*Argument.*  
 —

It was then contended, that, inasmuch as the interests of the partnership required that the brewery should be sold as a working concern, the business ought to be carried on in the meantime, and that for that purpose a manager ought to be appointed by the Court. This was opposed on the part of the Defendant *Edward Phillips*, on the ground that one of the partnership articles was to this effect:—"That *Edward Phillips* should be and be considered as the acting partner, and should employ himself, during the continuance of the partnership, diligently and constantly in the conduct and management of the joint business to the utmost of his skill and endeavour, and entertain and find viands and provision for the customers of the brewery on all occasions when necessary; and that, for the superintendence and management of the said copartnership business, and entertainment of customers as aforesaid, he should be allowed and paid the annual sum of 300*l.*, out of the profits of the partnership, during so long a time as he should continue to act as manager, and should, during the continuance of the copartnership, or so long as he should continue the acting partner and reside in the principal dwelling-house adjoining the brewery, have the sole occupation thereof, free from the payment of rent, rates, taxes, or repairs." On the part of the Plaintiff, it was insisted that this clause applied only to the time of the due and regular prosecution of the business under the contract, and not to the interim management between the dissolution of the partnership and the sale and distribution of the effects.

The VICE-CHANCELLOR referred to *Wilson v. Greenwood* (a), and expressed his opinion to be, that the Court should appoint a manager, and directed the same accordingly.

(a) 1 Swanst. 471, 481.

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TIBBITS  
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Judgment.

THE MIDLAND RAILWAY COMPANY v. THE AMBERGATE, NOTTINGHAM, AND BOSTON AND EASTERN JUNCTION RAILWAY COMPANY. Jan. 27th & 28th.

THE Plaintiffs had been empowered by several Acts of Parliament, among other works, to make a railway from Nottingham by Newark to Lincoln, and from Nottingham to Mansfield; and the Defendants were empowered to make

The Court will enforce by injunction the provision of the 115th section of the Railways Clauses Consolidation Act

(8 & 9 Vict. c. 20) that no engine or other description of moving power shall be brought or used upon a railway, unless the same shall have been approved by the railway company as therein mentioned, notwithstanding the practice of railway companies has been to rely on each other with respect to the fitness of their respective engines, and not to enforce the provision of the Act; and notwithstanding also, that, to enforce such right of inspection, would occasion great inconvenience to the public traffic, and although it may appear that the provision is sought to be enforced, not from any apprehension of the use of improper engines, but for the purpose of impeding the traffic over their line of a competing company.

Although the expression "the railway" is, by the interpretation clause of the Railways Clauses Consolidation Act (s. 3), defined to mean "the railway and the works by the special Act authorised to be constructed," and these have been construed to include a station, yet it is very doubtful whether the power reserved to the public by the Railways Clauses Consolidation Act (s. 92), to use "the railway" with engines and carriages, upon payment of tolls which are calculated at a certain rate per mile, includes the power of using also the stations of the company.

An interpretation clause in an Act of Parliament should be understood to define the meaning of the word thereby interpreted in cases as to which there is nothing else in the Act opposed to or inconsistent with that interpretation.

The Court refused to restrain one railway company from using the station of another, under an agreement, which was made between the two companies, before a connection had been established between the company using the station and a third company, which brought such third company into competition with the company to whom the station belonged—it not being clear that the right of the Defendants to use the station was not intended to be given by their special Act—the agreement being open to the construction that the extent and terms of the station accommodation were from time to time to form the subject of reference to arbitration, and there being no award specifying the time at which it should determine; the rival or competing company having also been in existence at the time the agreement was made, and the plaintiffs being therefore at that time aware of the possibility of the competition afterwards arising; and, supposing the question to be doubtful, the balance of convenience preponderating against granting the injunction.

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 v.  
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 GATE, NOT-  
 TINGHAM, AND  
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 RAILWAY CO.  
 —  
*Statement.*

a railway, to commence by a junction with the Plaintiffs' railway, near the *Ambergate* station, to pass through *Nottingham*, *Grantham*, and other places, and terminate in or near *Spalding*, with a branch to *Boston*. In 1847 the Defendants were empowered to make an alteration in their line, and to commence by a junction with the Plaintiffs' railway in the parish of *Colwick*, in the county of *Nottingham*, and to make the branch railway into the town of *Nottingham*, commencing by a junction with the *Nottingham* and *Mansfield* branch of the Plaintiffs' railway at a certain spot mentioned in the Act. By an Act of the 10 & 11 Vict. c. lxxviii. s. 11, it was enacted, that, for the use of the branch of the Plaintiffs' railway for the conveyance of any traffic brought thereon from the Defendants' railway between the point of junction in the parish of *Colwick* and the point where it diverged from the Plaintiffs' railway near *Nottingham*, it should not be lawful for the Plaintiffs to charge any further sum than the tolls or charges due for the distance over which the traffic should be conveyed along the Plaintiffs' railway, together with a reasonable charge for loading and unloading; and it was provided, that nothing therein contained should prevent the Plaintiffs from making such reasonable charge for station accommodation at *Nottingham* as should be agreed upon between the said two companies, or, in case of any difference, that it should be settled by arbitration (a). An agreement, dated the 5th of August, 1847, was made between the Plaintiffs and Defendants for referring it to arbitration to settle the extent and price of the station accommodation to be given by the Plaintiffs to the Defendants at *Nottingham* and *Ambergate* (b). Mr. *Glyn*, who was appointed umpire on the arbitration, made his award, dated in July, 1850, and fixed that the sum to be paid to the Plaintiffs by the Defendants for rent and service on the *Nottingham*

(a) See p. 371, *infra*.

(b) The material parts of this

agreement are stated in the judgment, p. 372, *infra*.

station for passengers' traffic should be 600*l.* a year; for the goods traffic, 1*s.* 4*d.* per ton; and for the cartage, the actual disbursement of the Plaintiffs (a).

In 1846 the *Great Northern Railway Company* was incorporated, and in 1852 their railway was completed and opened for traffic between *London* and *York*, and became a competitor with the Plaintiffs' for the traffic between *London*, *Grantham*, *Newark*, *Lincoln*, *York*, and other intermediate places. In May, 1852, the Defendants entered into an agreement with the *Great Northern Company* for the latter to work the traffic on the Defendants' line. Some correspondence appeared to have taken place between the officers of the Plaintiffs and of the *Great Northern Company*, in which the Plaintiffs insisted (as the bill charged the fact to be) that the award of Mr. *Glyn* had no application to the altered circumstances under which the line of the Defendants was to be worked. The bill alleged, that the *Great Northern Company*, under the authority of the Defendants, began in July, 1852, to book and convey goods; and from the 23rd of December, 1852, also passengers, from *London*, *Lincoln*, *York*, and other places on the *Great Northern* line by way of *Grantham*, over the Defendants' line into the Plaintiffs' *Nottingham* station. In August, 1852, one of the *Great Northern* engines, which had not been submitted to or approved by the Plaintiffs, arrived at their *Nottingham* station, drawing a passenger train, and was seized and for some time detained by the Plaintiffs' servants. The Plaintiffs in the same month gave notice to the Defendants that no engine would be allowed to come or remain on the *Midland* line; with regard to which the provisions of the 115th and following clauses of the Railways Clauses Consolidation Act, 1845, had not been observed, adding, that this intimation

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(a) See p. 376, *infra*.

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 —  
*Statement.*

was not to apply to the five engines belonging to the Defendants, which had already been allowed to run on the *Midland* line.

The bill complained, that, notwithstanding those notices and protests, the Defendants, in December, 1852, brought and used on the Plaintiffs' line and into the *Nottingham* station, several locomotive engines, which had not been approved by or on behalf of the Plaintiffs, and without having complied with the provisions of the statute; and that they threatened and intended to continue their use of the *Nottingham* station, and to bring and use on the Plaintiffs' line, between *Colwick* and *Nottingham*, such engines and carriages.

The Plaintiffs moved for an injunction in the terms of the prayer to restrain the Defendants from using, or authorising or permitting the *Great Northern* or any other railway company to use the Plaintiffs' station and other accommodation at *Nottingham* upon the terms mentioned in the award of Mr. *Glyn*; and also to restrain the Defendants from bringing, or using, or authorising, or permitting the *Great Northern* Railway Company, or any other company, to bring or use upon the Plaintiffs' line of railway, between the junction at *Colwick* and their station at *Nottingham*, any locomotive or other engine, or other description of moving power which had not been first approved by or on behalf of the Plaintiffs, pursuant to the provisions of the Railways Clauses Consolidation Act, 1845, or any carriage with respect to which the provisions of the said Act in that behalf had not been first complied with.

There was little or no contest as to the facts above stated. Affidavits of experienced persons on behalf of the Defendants stated that the deponents had never known

an instance in which any railway company, whose lines had been traversed by engines, carriages or waggons of another company, had required a previous inspection of such engines, or that they should be previously registered in pursuance of the Railways Clauses Consolidation Act; that it would be impossible to enforce any such regulation between railway companies without materially interrupting, if not entirely stopping, the traffic from one part of the kingdom to another; that no railway company would be able to carry on its business if such regulations were strictly enforced, without such an increase in its number of carriages as would involve an enormous outlay; that the manufacture of engines, carriages, and waggons in England was either in the hands of the railway companies or of a very limited number of other firms, and their several methods of construction agreed in their main points; that the engines, carriages, and waggons were invariably examined by the company first sending them, and the fact of their being allowed to pass on the sending line was always considered a sufficient guarantee to any other company of their construction and condition.

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Mr. *Rolt* and Mr. *Speed* for the Plaintiffs.—As to the first part of the injunction sought, the use of the station, argued—That the agreement was made under circumstances which were wholly different; and that the exercise of the powers which it was expressed to give, was in the new state of things a fraud upon the agreement. And with regard to the second part of the injunction, the exclusion of engines until approval, they claimed, on the part of the Plaintiffs, the protection of the provisions of the Railways Clauses Consolidation Act(a), on that subject. On both points they contended, that the difficulty of asserting

*Argument.*


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(a) 8 & 9 Vict. c. 20, s. 115.

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 —  
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the legal rights of the parties in an effectual manner, without collision and danger, rendered it a case in which the Court ought to interpose.—They cited *The Lancashire and Yorkshire Railway Company v. The East Lancashire Railway Company* (a).

Mr. Baily, Mr. Erskine, and Mr. Hedge, for the Defendants, opposed the motion.—They argued, that the power of excluding engines had never been enforced, and the attempt to exercise it in this case was simply vexatious. It was not averred, that there was any apprehension of unfit engines being used; and, as to the use of the station, they contended that the right to use the railway involved the right to use every thing which came within the interpretation of that term, including stations as well as all other necessary works and adjuncts: 8 & 9 Vict. c. 20, s. 3; *Cotter v. The Midland Railway Company* (b). They insisted also, that, whatever the legal rights might be, the Court would not interfere, after so long a time had elapsed without the right of exclusion having been insisted upon.

The cases of *The North Union Railway Company v. The Bolton and Preston Railway Company* (c), *Samson v. Easterby* (d), and *Rigby v. The Great Western Railway Company* (e) were also cited.

*Judgment.*

The VICE-CHANCELLOR, without hearing the reply on the second branch of the application for the injunction, said:—

I cannot help seeing some of the objects which the parties may have in view in this application; yet, with regard

(a) 6 Railw. Cas. 802.

(b) 2 Ph. 469.

(c) 3 Railw. Cas. 345.

(d) 9 B. & C. 505.

(e) 2 Ph. 44.



to the second part of the motion, I feel that I am bound to say that—the Plaintiffs having a distinct right under the 115th section of the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20) to refuse permission for any engine to come on their line, unless it has been approved of by them in the manner specified therein, and as to which the first step is to be taken by the parties who wish to run their engines, by giving certain notices,—and the Plaintiffs having given distinct and specific notice, having in fact remonstrated, and still continued to remonstrate, with the Defendants on sending their engines,—I think the Defendants have put themselves in the wrong. Whatever may be the result to them in this case, it is impossible to say that the Plaintiffs are not to have the full powers conferred upon them by the Act; and that the Defendants are not to be restrained from running these or any other engines without their having first been examined and approved of. These observations apply to all except the five engines referred to in the correspondence.

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 —  
*Judgment.*

With regard to the five engines that have been allowed to run on the Plaintiffs' line, the Plaintiffs, by the letter of the 9th of August, in which they state that they desire to have an examination according to the Act, say, "This intimation will not apply to the five engines belonging to your company which have already been allowed to run on the *Midland* line." After that, there would be, I think, some difficulty in insisting upon the right to the injunction with regard to these five engines. But, as to the other engines, I should be inclined to grant an injunction to restrain the Defendants from running them or any other engines without their being previously approved of by the Plaintiffs.

Upon the other point I must hear the Plaintiffs fully, for there are considerable difficulties.

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Mr. *Rolt* was heard in reply.THE MIDLAND  
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VICE-CHANCELLOR:—

In this case, the objects of the Plaintiffs and the Defendants in this dispute are apparent; but it is not with the object or motive of either that I have to deal. I have only to deal with their legal and equitable rights, and to consider how far the rights of the Plaintiffs can be assisted, at this stage of the proceeding, by any interference on the part of the Court.

With regard to the second branch of the injunction, I have already stated the extent to which I think the Plaintiffs are entitled to be assisted; although, even as regards that, I may have my own conception as to the views and objects with which this claim is now brought forward. Still, if the Plaintiffs are fairly justified in asserting their right, and in exercising it, it would be improper to refuse the injunction. The claim has been brought forward in an early stage of the proceeding complained of, and it has been insisted upon as late as the 16th of December last; and that which appears to me a plain and unequivocal right under the statutory law has been resisted up to the time of the filing of the bill, and even since that time—there having been affidavits filed for the purpose of shewing that it is impossible for the Plaintiffs to exercise rights, such as are conferred upon them by the Act of Parliament, without great interference, annoyance, and vexation, and without seriously inconveniencing and endangering the traffic on this line or indeed any other line. The plain answer to that is, that the legislature has given those rights; and that, if it be so very inconvenient a matter, it must be again brought before the consideration of the legislature; but, until it is brought under the consideration of the legislature, I have nothing to do but to enforce the rights which exist. Those rights having been

contested up to the last moment, I think the Plaintiffs are entitled to the interposition of the Court.

As to this part of the case, the question arises—what is to be done, both as to the past as well as to the future. As to the future, as I have already said, it seems to me clear that the Defendants should be prevented from using all the engines (except the five) until they shall have been first examined and approved of, according to the words of the Act, by the engineer of the Plaintiffs, and certified by him.

With regard to the two particular engines that have been referred to, I think it right to impose on the Plaintiffs the necessity of their obtaining a certificate of their engineer, under the provisions of the general Act, within seven days from the time that the engine, No. 6, shall be placed within their control for the purpose of inspection; and as to the other engine, which is now in the Plaintiffs' possession and control, within seven days from the date of the order. As to the remaining five engines, I refer to the letter of the 9th of August, 1852, on which those engines are excepted from the notice. I find no departure from that statement in the subsequent communications.

It has, however, been argued by Mr. *Rolt*, on the part of the Plaintiffs, that, if from neglect of duty they have not thought fit to examine and certify those engines under the 115th section of the Act, they are in a condition to perform that duty now; and if it be not only a duty but a right which is vested in them of examining the engines, it is a legal right of which they ought not to be deprived; and it is then said, that, if I leave them to exercise that right, by obstructing the engines in their progress along the line, or on the line, there will be great danger of collision, which is an inconvenience that this Court

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---

Judgment.

ought to obviate. I cannot take that view of the case. I do not feel called upon to decide what are the legal rights of the Plaintiffs on this point: but, in this Court, after having stated that those engines are not to be considered as within the 115th clause of the Act, and after they have been allowed to run on the line, it is rather to be assumed, from what has passed, that the Plaintiffs have done their duty; that they have taken proper pains to satisfy themselves of the fitness of those engines, and have thought that they were in such a condition, as to be fit to run on the railway. I think, therefore, I ought not to interfere with those five engines. If it should appear that there is any power in the general Act, enabling the engineer afterwards to certify that they are or have become improper engines to run on the line, that power will probably be exercised, and I shall not at all be inclined to interfere with a due exercise of the legal rights of the Plaintiffs.

I now come to the principal point in the case—the consideration of what is proper to be done with reference to the first part of the injunction that is prayed. It has been asked for, in argument, in one or two forms:—In substance, I am asked to prevent the Defendants from using the *Nottingham* station altogether, on the assumption that there exists no authority, by the general statute, by the particular statute, by the agreement, or by the award. It was said, it might be put in such a simple form as to occasion no great difficulty. I am asked to restrain the Defendants from using the station with reference to any passenger or other traffic, booked through or carried through by any arrangement with the *Great Northern* Railway Company. Now, if it were clear that the Defendants had no right to the use of the station at all, the course for the Court to pursue would be very simple, and I should have no difficulty in granting the in-

junction asked; for if one public company have power to run their engines over their own line, and, exercising that right, are embarrassed by an unjust claim on the part of another company to make use of their station, it would be very difficult and dangerous for them to prevent the assertion of such claim—looking at the nature of locomotive engines—without the aid of this Court. But I do not think that I can, by any means, arrive at that conclusion on the position of these parties as it is now brought before me. I do not think it necessary, at this moment, to give a positive opinion whether or not the Defendants have the right, which they claim, of using the station: it is enough for me to say, upon this application, I think it by no means clearly made out that they have not.

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 Judgment.

Let us see, first, how the question stands upon the general statute (a); and, with regard to that, I confess that I should have considerable doubt, if the point came to be determined, how far there is the power to use such railway station. The point has never yet been determined in any case. I was referred to *Cothor v. The Midland Railway Company* (b); but there, Lord Cottenham only decided, that, as the interpretation clause says, that "railway" shall include the "railway and works," and there was a power to take land to make and maintain the railway and works, the company had power to take land for making a station. With regard to all these interpretation clauses, I understand them to define the meaning, supposing there is nothing else in the Act which is opposed to the particular interpretation. When a concise term is used, which is to include many other subjects besides the actual thing designated by the word, it must always be used with due regard to the true, proper, and legitimate construction of

(a) 8 & 9 Vict. c. 20. See sect. 92.

(b) 2 Ph. 469.

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RAILWAY CO.*Judgment.*

the Act. When the question is not of taking land for the use of the station, but the question is, whether other parties have a right, under the toll clause in the general Act, of using the railway on payment of tolls, I think, to say the least, it is extremely doubtful whether that implies a right to use the station, and for this reason, that the tolls are imposed per mile. They are mileage tolls, imposed on all parties who use the railway, which is a matter of easy calculation. The use of the station is an entirely different thing. The station is probably erected by the company at a great expense, for their own convenience,—the company not only making and maintaining the railway, but carrying on also the business of carriers; and it would seem a strong thing to contend, that the use of the station, of that which may have cost a great proportion of the whole outlay, is to be thrown in on payment of the mileage toll. Take the *Greenwich* Railway, for instance; there might be two or three miles of railway to run over, and yet the persons paying the mileage toll would claim all the advantages and the accommodation afforded at the station. I think, looking at the scope of the clause, which provides, that, on payment of tolls, the railway shall be free, that it may be consistent with a more reasonable construction to say, that everybody may have the use of the railway; that they have the power of buying land adjacent to the railway; and if they have such land, they have by the general Act (a) a power of laying down a line of rails communicating with the railway; and then they may form their own station, and, by paying a mileage toll, they may use the public railway as a means of transit, in order to carry them from their own station which they may have made on one piece of ground, to another station which they may have made on another piece of ground. If it should ever come to be decided, it is certainly very doubtful whether the use of the railway, on payment of the tolls, will include the use of the station.

(a) 8 &amp; 9 Vict. c. 20, s. 76.

If the construction of the general Act be doubtful, the next thing to be considered is the special Act (a), and upon that the case is rather more favourable to the Defendants. Assuming, for the purpose of the argument, that the parties had power to use the station under the general Act, it may be supposed that the words of the special Act, which recite, that the traffic of the Defendants, the *Ambergate* Company, is intended to be conveyed "to the station of the *Midland* Railway Company at *Nottingham*, or onwards to the terminus of the first-named (the Defendants) railway at the *Ambergate* station of the *Midland* Railway," meant that they only intended to do that which the general Act authorises them to do. That might, then, be the fair interpretation of the words. But if the Defendants have no such right, then, I confess, looking to the express recital that this company intended to come to the station of the *Midland* Railway Company, and to the clause introduced for the protection of the *Midland* Railway Company, which it is said, on all hands, was inserted at their suggestion, and especially the provision at the end (b), all the parties being before Parliament, and this clause being the joint work of the two parties, to which the legislature gave its sanction, it becomes at least an arguable question whether the right was not intended to be conferred by the special Act,—the one company stating their intention of coming there, and providing that they shall escape the six-mile clause, which, I agree with Mr. *Rolt*, was the principal object of putting it in—but the other company standing by, and seeing that expression of intention, and guarding themselves by the subsequent clause. It is not for me, at this moment, to determine whether it was intended, upon the whole scope of these provisions of the special Act, that

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(a) 10 & 11 Vict. c. lxxviii., to *Lincoln*.empowering the Plaintiffs to extend their line and make a branch (b) See p. 360, *supra*.

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there should be a use of the station by the Defendants; but, unless there was some compulsory operation in this clause with reference to the use of the station, I do not understand why the Plaintiffs procured to be inserted for their own protection a clause, that the amount of the charge for this accommodation should go to arbitration in case of difference. The provision is not that a question of bargain between them whether the Defendants should have the use of the station or not, shall go to arbitration, but that the amount of a reasonable charge shall be thus settled. If it be supposed to be intended clearly that there shall at all events be a user of the station, then I can understand why neither the one company nor the other should be left to decide for themselves, but that the whole terms shall be left to arbitration.

We have then to consider the agreement, and that agreement rather favours than otherwise the Plaintiffs' contention, that, up to that time they were not bound. The agreement is dated after the passing of the special Act, and the Defendants contend that the general Act and the particular Act, especially the latter, give them this right. Yet I find in this agreement, dated after the last Act, a recital that the *Ambergate* Company (the Defendants), "not deeming it expedient to build or provide separate and distinct station-houses and platforms," &c., "had applied to the Plaintiffs to provide for their use suitable accommodation for such purposes at their stations at those places, which they the said Plaintiffs had consented and agreed to do on the terms and in manner thereafter mentioned." Certainly, it would seem very strange if they had already the power of using the station, that they should recite the agreement made after the Act, when they say the power was acquired. They then entered into an arrangement with the Plaintiffs, and the Plaintiffs consented and agreed to do that which, according to the ar-



gument for the Defendants they were bound to do. I cannot help thinking, when I look at the whole of the transaction, and this agreement following very closely upon the passing of the Act, that the intention referred to in the 17th section pointed prospectively to the agreement as about to be framed. There are statements in the affidavits, that it was on the faith of this agreement that these arrangements were made; and, although it was in argument asked how an Act of Parliament in July could be made upon the faith of an agreement in August, yet I think it is not an unreasonable view of the facts that the intention was so recited in the special Act, because the parties had made up their minds to do that which is carried out by the formal agreement in August. Now, there is in the first part of the instrument a distinct and positive agreement on the part of the Plaintiffs to provide a station upon the terms and in the manner thereafter mentioned. The terms are these:—"That, upon the application and request in writing of either of the said companies to the other of them, it should be submitted and referred to one of the directors for the time being of the *Midland Railway Company* (the Plaintiffs) and to one of the directors for the time being of the *Ambergate &c. Company* (the Defendants), such two directors to be nominated and appointed as thereafter mentioned, to settle, determine, and decide"—not whether they are to use the station or no, but, having said that the Plaintiffs agree to provide the station on those terms, the agreement goes on "to settle, determine, and decide the nature and extent of the station or other accommodation which would be required to be provided by the *Midland Railway Company* for the traffic and other ordinary purposes of the *Ambergate &c. Company*." If the agreement had stopped here, it would be an agreement to provide the Defendants a station, on terms to be settled by arbitration. As it is, there is the following clause, which makes the case more doubt-

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THE MIDLAND  
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---

Judgment.

ful than it otherwise would be, as to the rights of the Defendants. The agreement proceeds:—"And also to settle, determine, and decide the place or places where, and the time or times when any additional offices, warehouses, and other buildings and conveniences (if any should be necessary) should be built or provided by the *Midland Railway Company* for the use of the *Ambergate &c. Company*, and also to settle, determine, and decide"—and this creates the ambiguity—"what sum or sums of money, (either in gross, or by the way of rent or annual payment, or both), or what other compensation or equivalent should be paid or given by the *Ambergate &c. Company* to the *Midland Railway Company* for or in respect of such accommodation as hereinbefore is mentioned, and generally to settle and determine all and every the terms and conditions relating to the premises, and the mode, extent, and duration of the enjoyment of the said accommodation." Certainly, it here seems to be referred in very large terms to the arbitrators to say how long the arrangement is to last. Looking at this agreement, independently of the Acts of Parliament, it seems that the companies agree to put it out of their hands to say as well how long the accommodation is to continue, and to what extent it is to be, and to refer those questions to other parties; and if that be so, the arbitrators would have the power of determining the whole arrangement, and of saying, "we conceive it is proper that the accommodation should now cease to be given."

It was argued, on the other hand, that this agreement was for one definite arbitration to be made once for all; that the award ought to have stated the extent of the accommodation, its price, and its duration; and that, having so done, there would be an end of the whole arrangement, and no opportunity for a subsequent reference to ascertain whether the period should be longer, or whether

there should be any variation of the sum. I think it very difficult to put that construction on the agreement, looking at the clause, which provides that they shall state the places where, and the times when, any additional offices, warehouses, and other buildings and conveniences, (if any should be necessary), shall be provided. It would be difficult for the arbitrators to ascertain that at once for all time. When I suggested this difficulty, the answer was, the arbitrators might be able to say at once, "we see that the accommodation now existing at *Nottingham* is not large enough for your traffic, and we foresee that larger accommodation must be provided, and we will now at once lay down the time within which it shall be made." I confess that it seems to me to point much more naturally to their saying, from time to time, what further accommodation would be necessary, in proportion to the increasing traffic of the two companies.

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RAILWAY CO.*Judgment.*

The agreement having been made, the settlement of the terms was entered upon in that loose manner which one has before had occasion to observe in transactions between these large bodies. It does not appear that there was any distinct reference to arbitration. Two directors met, and seem to have done something which is not in evidence. I do not know what is to be assumed, for nothing appears on the proceedings, but that they entered into some arrangement, which has been acted upon, as to the place of deposit of their goods, and where the warehouses should be, if there were to be any, and where the landing places should be. It would seem that they only differed on one or two points which were sent to the arbitrator. Nothing is stated but the fact of that difference. The points referred were, the amount of compensation to be paid, first, for the passenger traffic, and secondly, for the goods traffic. The other points seem to have been previ-

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THE MIDLAND  
RAILWAY Co.

THE AMBER-  
GATE, NOT-  
TINGHAM, AND  
BOWTON AND  
EASTERN  
JUNCTION  
RAILWAY Co.

*Judgment.*

ously arranged between the parties to their own satisfaction.

Mr. *Glyn* made his award on the 9th of July, 1850, and fixed 600*l.* a year for the passenger traffic, and 1*s.* 4*d.* per ton for the goods traffic, and said he did that "upon the consideration of the existence of a full interchange of traffic between the two companies, and of their working reciprocally for the accommodation of the public and for mutual benefit," adding, that "a deviation from this course would fairly cause a re-opening of the pending questions, and another reference upon them." This preamble has been commented upon with much force in the argument for the Plaintiffs. I cannot say that I am satisfied with what has been said on the other side with reference to the effect of this arrangement. When Mr. *Glyn* speaks of the companies working reciprocally and an interchange of traffic, he must have contemplated that they were to work in a friendly spirit and for their mutual benefit. I cannot attribute any other effect to those words. Assuming this point in favour of the Plaintiffs, for the present purpose, and assuming that what has taken place since has not been for their mutual benefit, (though there may be a good deal suggested on the other side,) still, assuming for the purpose, on behalf of the Plaintiffs, that the time has arrived when, according to Mr. *Glyn's* notion, the matter should be re-opened, it would only re-open what was referred to him. He had nothing to do with any other matters. They had not been brought under his consideration. He says, looking at things as they stand, I think 600*l.* a year is enough; but there may be a time, when, under other circumstances, a change would be proper. They say that the time for this has now arrived; but still you fall back on the old agreement, and we must see whether it is made out clearly, that the Defendants have

not, under the first part of that original agreement, subject to the question of their having to pay more, a right to contend that they have an agreement which entitles them to use the stations at these particular places for their goods and passengers. This seems to be the difficulty of the Plaintiffs' case. They say, "true, we gave you the station, and Mr. *Glyn's* award, as far as it goes, shews that you were not to enter into contracts which are positively hostile and detrimental to us." But, reverting to the agreement, they have not any longer the same strong ground that they have on the award; we do not find in the agreement any provision, which says, the Defendants shall not enter into arrangements with the Plaintiffs' rivals in trade. We do find, however, that, at that moment, there existed the Act of 1846, which established the *Great Northern* Railway up to *Grantham*, and in direct conjunction with the *Ambergate* Company, and there further existed the *Eastern Counties* line, which, if it had been continued, would have run into the projected line of the *Ambergate* Company; and with the knowledge which the parties must be assumed to have of all these facts, there is no stipulation in the agreement providing that the use of the station is to be subject to the condition, that the Defendants shall not enter into arrangements with another company, which shall be detrimental to the Plaintiffs' trade. If this be so, can I say there is anything in the agreement, which clearly shews that it is a determinable agreement, and one which, in the present state of things, has determined,—that it is not intended to have any permanence until the arbitrators or umpire say it shall be permanent. May it not, to say the least, be contended, with very strong and plausible grounds, that the agreement was one, which was, at least, to continue until the umpire said it should not? Possibly, it may then be brought to an end; but until the arbitrators or umpire shall say it is at an end, how can I, in this stage of the

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GATE, NOT-  
TINGHAM, AND  
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*Judgment.*

cause, say the Defendants are not to have the full advantage of it.

If, then, the Defendants are to have the full advantage of the agreement, will that which they have done be clearly beyond the scope of that agreement? The strongest point in the case of the Plaintiffs is founded on the passage of the bill, and supported by affidavits, which aver, "That the Defendants are daily using the Plaintiffs' line of railway, and the Plaintiffs' station and other accommodation at *Nottingham*, for the purposes of the *Great Northern Railway Company*." It has been justly observed, that the affidavits of the Defendants evade the question, and say only that they do not know of any traffic arrangement by which the traffic is booked through. The averment in the bill thus remaining, I think, that, for the purpose of this motion, I am bound to consider there does exist some traffic arrangement, which is in direct competition or rivalry with the Plaintiffs'; and that is as high as the argument can be put in their favour. Is there, then, anything in the agreement which prevents the Defendants from doing this. It is not a thing which is unlawful. It is not averred that they may not lawfully enter into a traffic arrangement, in direct competition with the traffic on the Plaintiffs' railway. Indeed, it immediately occurs, in considering the subject, that if any *London* traffic is to be brought by the *Great Northern* line to *Nottingham*, by way of *Grantham*, it must be in strict competition with the Plaintiffs'. All that was known when the agreement was entered into. It was known that the *Great Northern* line existed, and that, when it was made, there was a possibility, not to say probability, of this competition occurring; and knowing this, if the Plaintiffs had thought proper, they might have refused to enter into the agreement, except for so long a time as the Defendants should work with them on satisfactory terms; but nothing

of the kind was done, yet the alteration in the traffic and the present mode of working is said to be in fraud of the agreement. If the agreement had been in the words of Mr. *Glyn's* award, I think there would have been considerable ground for saying that it was so; for I cannot help considering Mr. *Glyn's* award as implying that they should be working on terms of mutual understanding; and if there had been such words of recital in the agreement itself, it might have been a ground for saying, that it is a fraud to enter into an arrangement with the *Great Northern* in the carrying on of their traffic. There is, however, nothing of that kind in the agreement itself. Mr. *Glyn's* award only implies that there ought to be some new arrangement as to price; and the question is, whether the Defendants are, in this state of things, to be enjoined from carrying on the traffic, and using the station, subject to any alteration of price or terms under the new circumstances. I cannot arrive at the conclusion, that they ought to be so restrained by injunction; I do not put it more strongly than that; for, if the Court has not arrived at a clear conclusion in favour of the Plaintiffs, I apprehend that the balance of inconvenience must be considered; and, in this case, if you look to the balance of convenience and inconvenience, I think there is no hesitation in saying where it preponderates. On the one hand, supposing the conduct of the Defendants to be in fraud of the agreement, and that the rights of the parties have to be determined on that view; and that ultimately the Court may consider that all the passengers and goods that have been booked through, or that have come under this agreement between the two parties, ought to be charged in some different manner or at some different toll, and in some other way than is charged under this agreement; then, the difficulty which they are put to is in finding out the amount of such traffic: the difficulty is not, even then, greater than it would be if I granted the injunction

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Judgment.

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in the terms asked for by the Plaintiffs, for then there would be the same difficulty before I could act on the injunction by committal in establishing the case; and if the Plaintiffs do establish the case,—they have still their remedy at law, by way of action, for the damages that have arisen by the passengers and goods being brought through, as it is alleged, in fraud of the agreement; but if I should ultimately be of opinion that there is nothing to prevent this particular arrangement being entered into between two companies, although in direct competition with the Plaintiffs' line, then I should, in the meantime, be putting them, by this injunction, under very considerable difficulty; and I should have prevented the Defendants from bringing the passengers that come from *London* by the *Great Northern Railway* under the existing arrangement, which, at present, I am bound to assume is a legal arrangement between the Defendants and that company. I should, therefore, by the injunction, do an immeasurable damage; for no jury could ever estimate how many people would have travelled by the line if I had not stopped them. On the other hand, if the Plaintiffs, by amending their bill, can discover what number of passengers have travelled in fraud of this arrangement, they will have their remedy if entitled to it. Lord *Cottenham* proceeds on this principle in that which was always considered a strong case, certainly stronger than this, of *Rigby v. The Great Western Railway Company* (a).

I will make one remark on the *Lancashire case* (b), which has been cited. Where there was an agreement entered into by the proprietors of a small line of railway with another company, that they should pay for their particular traffic over that line of railway a certain

(a) 2 Ph. 44.

(b) *The Lancashire and Yorkshire Railway Company v. The**East Lancashire Railway Company*, 6 Railw. Cas. 802.



toll, less than the ordinary toll, with which they would have been chargeable under the general Acts, if such an agreement had not been entered into, and that small line of railway was afterwards extended to a very considerable length, one or two hundred miles, and the extended company—the company that possessed the whole extended line—acquired all the rights of the smaller company, by an Act of Parliament which expressly enacted that all the agreements of the smaller company should enure to the benefit of the larger; there it was decided, that, although it was true the larger company had the benefit of the agreement made in their earlier state, yet they could not claim that benefit with reference to all the passengers who were using that extended line. The agreement was made when there existed no such extended line, and therefore must, of course, have been intended to include only all the ordinary traffic coming from the terminus of the smaller line, not brought there by railway, but by conveyances on common roads. When they come to the question, how this division of the traffic is to be made, there would, no doubt, be considerable difficulty in ascertaining what passengers would have come by the shorter railway. The Court, however, held that the contract remained good, as to the original line, for all those coming by that limited portion, whatever the difficulty might be in distinguishing them; and it is not for me to express the least doubt of the correctness of that decision. That case would have been strongly in favour of the present Plaintiffs, if it had stood on the same footing; but the present case differs in this particular circumstance,—that, a year before the agreement, an Act had passed for making the *Great Northern Railway*—the competition of which is now complained of—and which was to land its passengers at *Grantham*. It can hardly be supposed that parties engaged in these transactions were ignorant in fact or in law—I cannot assume that the parties who framed this

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—  
*Judgment.*

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agreement were ignorant of the existence of that line, or of its probable effect, in bringing passengers to *Grantham*; and, therefore, when they entered into this agreement, they cannot be taken to have been unaware of the circumstance which would require the station room which is provided for by the agreement. It is a circumstance bearing on that clause in the agreement which speaks of additional offices being given, if necessary, and the times when they shall be made, that the agreement itself contemplates that the traffic was not to be confined to the traffic then existing from *Grantham* to *Nottingham*, but might be largely augmented.

It has, however, been argued that this was not so: that the Plaintiffs bargained with a company, which was formed for making a long line of railway from west to east, extending to *Boston* and *Spalding*, and that the consideration of the extent of that line might have induced the Plaintiffs to enter into a different description of contract than would have been made if it had been known to be a company which was going, in truth, to make itself a mere branch of the *Great Northern* Railway. I think the answer to that would be, that the Plaintiffs must have been taken to be aware of the power which the legislature gives of abandoning a line or portions of a line, subject to questions which may arise as to the consent of proprietors or otherwise, as in the case of the *Direct Portsmouth* Railway. And, certainly, in this case, on an application for an injunction, I must notice the fact, that, in 1850, when the award was made, it must have been known that this line was made only to *Grantham*; and upon this the parties must have been acting for two years up to the time of the dispute arising; and it may also be remarked, as shewing the views of the parties, that the letter of Mr. *Bell*, in October, 1852, states that the *Midland* Company saw no sufficient reason for departing from the existing agree-

ment. I think, that, after this, it is too late for the Plaintiffs, as a ground for the injunction, to say that the agreement is to be differently construed in consequence of the Defendants not having formed their railway to the extent and in the manner that was originally contemplated.

The motion was also argued on the ground of the difficulty there would be,—supposing that the Plaintiffs had a right to exclude the Defendants from the station altogether, in so excluding them, without the interference of the Court. I think I have disposed of that argument, by saying that I do not think I have a right to exclude them altogether from the station. I cannot, for the reasons I have stated, see my way to grant any of the relief that is asked in the first branch of the prayer of the bill. The second branch I have already disposed of.

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*Judgment.*

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GENT v. HARRIS.

Jan. 18th.

**CLARA**, the wife of *Alfred West*, was one of the children and next of kin of *John Gent*, whose estate was administered under this claim; and, as such next of kin, she was entitled to one-sixth of the estate of the intestate. She married *Alfred West* in November, 1849, after the death of her father, she being then only nineteen years old, and in ignorance of the fact that *West* was then an uncertificated bankrupt. Her husband, in June 1852, went, as she believed, to *Australia*, leaving her totally unprovided for. The share of the estate coming to *Clara West* amounted to about 800*l*.

Settlement of the whole of the share of a married woman in the estate of an intestate upon the married woman and her children, with a provision, that, if there should be no children, and the husband should survive the wife, the assignees of the husband should take the fund, the case being one in which the husband, being an uncertificated bankrupt, had married an infant, and afterwards abandoned her.

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Mr. Batten, Mr. Walford, and Mr. Nicholls, for the different parties.

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The cases cited were *Carter v. Taggart*(a), *Napier v. Napier*(b), *In re Cutler*(c), *Scott v. Spashott*(d), *Kincaid's Trust*(e).

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*Judgment.*

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The VICE-CHANCELLOR said, that, in a case like the present, in which the husband had married an infant, not disclosing to her the fact that he was then an uncertificated bankrupt, and had afterwards abandoned her, leaving her without any provision, and without even an intimation that he intended to return to her, the Court might properly direct, that the wife's share of the estate should be carried to a separate account, with a declaration that she was entitled to the same for her life for her separate use, with remainder to her children(f); and that she should take absolutely, if there should be no children and she should survive her husband; but, if her husband should survive her, then, after her decease, that the assignees of the husband should take the fund.

(a) 1 De G., Mac., & G. 286.

(b) 1 Dru. & War. 407.

(c) 14 Beav. 220.

(d) 3 Mac. & G. 599.

(e) 1 Drew. 326.

(f) The declaration was in favour of such children as, being sons, should attain twenty-one, or, being daughters, should attain that age or marry.

1843.

## KELSON v. KELSON.

Jan. 13th &  
24th.

THE bill was filed by three of the infant children of *John Kelson* and *Joanna* his wife, against the father and mother, and sister, who was a married daughter of the same parents, and against *A. C. Phipps*, to set aside an appointment, made by the father in favour of the married daughter, of property comprised in a post-nuptial settlement, dated the 23rd of June, 1841, made by the father upon his children, subject to his appointment; and also to set aside a mortgage of the property so appointed to the defendant *Phipps*. The bill alleged that the appointment by the father to the defendant the daughter, was made for the purpose of raising money for his own use by means of the mortgage, and was therefore in fraud of the power.

The statement in a deed of settlement, executed after marriage, was, that it was made in consideration of 5*s.*, and divers other good and valuable considerations:—*Held*, that this statement did not, as against strangers to the settlement, amount to evidence that it was not voluntary; and a Defendant claiming against it as a purchaser for valuable consideration, and insisting at the bar that the settlement was fraudulent and void under the stat. 27 Eliz. c. 4, the Court directed an inquiry whether the settlement was founded on any and what valuable consideration.

The Defendant *Phipps* supported his title on several grounds, and, amongst others, contended that the settlement of the 23rd of June, 1841, was voluntary; and, therefore, under the stat. 27 Eliz. c. 4, fraudulent, as against a purchaser for valuable consideration, and which he claimed to be.

On the other side, it was insisted, that this defence was precluded by the express form of the settlement of the 23rd of June, 1841, which, although after marriage, was stated upon the deed itself to have been made in consideration of 5*s.*, "and divers other good and valuable considerations." The Plaintiffs had given no evidence of consideration other than what appeared from the language of the deed itself; and, at the hearing, they contended that the evidence upon the deed established a *prima facie* case of sufficient consideration to support it; and that, in order to impeach the deed, the Defendant

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must adduce evidence to displace the effect of the language of the deed.

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Mr. Rolt and Mr. Grove, for the Plaintiffs, cited *Pott v. Todhunter* (a).

Mr. Karstake, for the Defendant *Phipps*, cited *Peacock v. Monk* (b), *M<sup>c</sup>Queen v. Farquhar* (c).

Mr. F. Webb for the other Defendants.

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Judgment.

VICE-CHANCELLOR:—

The question is solely on the difficulty which arises from the peculiar position of the cause in point of evidence. The bill is filed by the infant children of the Defendant *Kelson*, who would have been entitled, under a settlement executed by their father, to an interest in certain property comprised in it, in default of appointment by the father. The bill alleges a fraudulent appointment made by the father on behalf of one of the daughters, named *Anne*, with a view to raise money for his own use; and which money was, in fact, raised by a deed of mortgage executed immediately afterwards to the Defendant *Phipps*. It appears, and no question was raised upon that fact, that the money obtained by means of the mortgage was paid to the father; and there is no doubt, that the whole object of the raising the money was for his use and benefit. This being the state of the case, it was contended by the Defendant *Phipps*, that the settlement was voluntary; and it was stated, that, the settlement being voluntary, he had taken the conveyance as a purchaser from the settlor. By way of explanation of the deed of

(a) 2 Coll. 76.

(b) 1 Ves. 127.

(c) 11 Ves. 467.

appointment in favour of *Anne* the daughter, it was said, that the mortgagee had required that deed to be made, and had obtained the concurrence of the daughter in the mortgage as a further guarantee and security to him for the confirmation of his title. It was thought (I do not understand how) that some benefit would be derived with respect to the legal estate from effecting the transaction in this form. But, if the contention of the mortgagee be well founded, there was no legal title in the parties to the settlement, the statute making all such conveyances void. That, however, was the form in which the title was taken; and the real difficulty that arises is one to which I should be in some respects sorry, if I were compelled, to yield, as it could only occasion the cause to stand over to see what might be done with respect to the settlement on a cross bill. The difficulty is this:—the settlement, although made after marriage, is expressed to be “in consideration of 5*s.* and divers other good and valuable considerations;” and the question then is, whether the statement in the deed, that there were certain other “good and valuable considerations,” not naming them, is not, without more, sufficient to enable the Court to say that the settlement is not to be regarded as voluntary. Upon this point there is a case which, I think, goes far to decide that these words will not, of themselves, amount to proof that the settlement was not voluntary. The case is that of *Gully v. The Bishop of Exeter* (a). It is not one of the cases to which I was referred. The like words occurred in the deed in that case. The deed there in question was dated so long back as 1672, and it was stated to have been made “in consideration of the sum of 20*s.* paid to *Robert Isaac* by one *Lewis Stevens*, and true and faithful services done, and also for divers other good and valuable causes and considerations him the said *Robert Isaac* thereunto mov-

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 Judgment.

(a) 2 Moo. & P. 266.

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ing." The learned Judge who tried the cause left it to the jury to say, whether the consideration of 20s., so long ago as the year 1672, and the services stated to have been rendered to the grantor, were not a sufficient consideration for the grant; and the jury found that they were. The question came before the Court of Common Pleas in an application for a new trial; and, in the argument in support of the verdict, it was said, that 20s., at the date of the deed, might have amounted to a valuable consideration; and that the services referred to might also have been such a consideration. The argument turned on these two points. The Chief Justice (*Best*) laid it down as clear, that the words "divers other good and valuable considerations," might be treated as mere surplusage or ornament; but said, that there was no evidence to shew that the service had not been performed, or that there were no other good considerations for granting the deed. Where a *prima facie* case is raised on the deed, the onus would be on the defendant to avoid the deed; but the case of *Gully v. Bishop of Exeter* seems to shew that there is no such *prima facie* case raised by these words. The whole reasoning of the Chief Justice proceeded on the fact, that 20s. might, a century and a half earlier, have been a substantial consideration, and on the services stated to be rendered, which would not have been necessary had the statement of a good and valuable consideration in the deed been alone sufficient.

If, then, the case be one in which the Court may inquire into the truth of the recital of a valuable consideration, the next question is, whether the Defendant is entitled to ask for that inquiry. Looking at all the circumstances of this case, I think the Defendant was not placed in a position to produce evidence at the hearing to controvert the deed. I think, on the other hand, that the plaintiffs ought to have an opportunity of shewing, if they



can, that there was a good and valuable consideration. The course I shall take will be the same as that taken in *Ford v. Stuart* (a), where, upon appeal, the Lords Justices thought the case was not absolutely clear, and granted an inquiry. I shall direct an inquiry whether the settlement was founded on any and what valuable consideration, and adjourn the case to Chambers to prosecute this inquiry.

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(a) 15 Beav. 493.

BOYS v. BRADLEY.

Jan. 15th &  
24th.

THE will of Admiral *Sayer*, dated the 13th of July, 1816, after describing himself by his rank, as C. B., and as in command of the naval forces in the *East Indies*, proceeded:—

“I hereby appoint my dear brothers *Charles* and *Benjamin Sayer*, Esquires, my executors, to pay all just de-

A bequest of the interest of a sum in Consols to such of the two brothers and six sisters of the testator as should be living on the day each dividend became

due; and, after the death of the last survivor of the brothers and sisters, to such of their children, the nephews and nieces of the testator, as should be living when the dividends became due; and a direction that the residuary estate should accumulate for twenty-one years after the testator's death, and then the whole to the testator's then nearest of kin in the male line, in preference to the female line, upon condition that the inheritor should assume the testator's surname, if not of that name, and bear his arms with due differences; and, in default thereof, to the next in lawful succession, and successively to the heir or successor who should comply with those conditions. The testator died a bachelor:—*Held*, that the words, the “then nearest of kin in the male line, in preference to the female line,” should not be read as meaning the nearest of kin being a male or males, exclusive of females, unless a distinct intention of excluding females were otherwise found in the will; and that no such intention, in this case, appeared, but, on the contrary, the use of words not indicative of sex, and the provision for taking the surname of the testator, rather indicated the absence of any such intention.

That the words “in the male line, in preference to the female line,” should not be read as in a parenthesis, so as to give merely a preference to the male line, but must be understood as confining the gift to the male line, and excluding the female line.

That it was not necessary that the person to take the residuary estate under the bequest should derive his title continuously through a line of males, passing by all females; and that the expression “in the male line,” was not equivalent to the expression “in a line of males.”

That the time of ascertaining the course of descent designated by the words of the bequest was at the death of the testator; and that the bequest did not contemplate a descent from the brothers of the testator in preference to a descent from his sisters; but that it contemplated a descent from his father, and not a descent from his mother, and that the limitation to the nearest of kin in the male line, in preference to the female line, should be construed as a gift to the nearest of kin *ex parte paterna*.

That a sister of the testator, who alone of his sisters and brothers survived the twenty-one years, was the nearest of kin within the description, and entitled to the residuary estate; and this, notwithstanding the same sister was also entitled to the interest of the sum of Consols set apart for the brothers, sisters, nephews, and nieces.

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mands, my funeral and other expenses, and legacies. To my dear sister Mrs. *Judith Innes*, who being amply provided for, I bequeath 50*l* for a memento of my affection. The proceeds of the entire remaining property which I may die possessed of are to be invested in 3*l*. per Centum Consolidated Annuities in the names jointly of my said two brothers and of my then unmarried sisters, for them and their executors to stand possessed of, in trust, to pay three fourth parts of the dividends or annual interest thereof, half-yearly, share and share alike, unto and amongst such of my six youngest sisters and my two brothers as may be living on the day each dividend respectively becomes due. Also, to pay the remaining fourth part of the said interest exclusively for the education and maintenance of the children of my said brothers and sisters, in as many equal shares as there may be of the said children living on the day each dividend respectively becomes due, whether born before or after my death."

The testator then declared that the proportions of the interest of his sisters and nieces should be for their respective separate use, without power of anticipation; and he proceeded:—

"At the death of the last survivor of my said eight brothers and sisters, three fourth parts of the interest of the capital sum then standing in the books of the Bank of *England* in virtue of this my will shall thenceforward be paid half-yearly, share and share alike, unto and amongst such of my above nephews and nieces as may be living on the day each dividend respectively becomes due at the Bank; and the remaining fourth part of the said interest shall be paid, share and share alike, unto such of their children, whether born before or after my death, as may be living on the day each dividend respectively becomes due at the Bank." And after a like declaration that the proportions of the interest of his nieces and their daugh-

ters should be for their separate use, he proceeded:—"At the death of the last survivor of my nephews and nieces, whether born before or after my death, the capital sum which, at the death of the last survivor of them, may be standing in virtue of this my will in the books of the Bank of *England*, shall become the property of the then nearest of kin to myself in the male line, in preference to the female line, upon the condition of the inheritor thereof assuming the surname of *Sayer* only, if not of that surname; and that such inheritor of the said capital sum shall bear and use, according to the law in such case enacted, the arms, with due differences, which may have been at any time previous to my death assigned to me. In default whereof, the next of lawful succession, and successively the heir or successor, who shall legally comply with these conditions in respect to the surname and the arms, shall become entitled to the said capital sum; provided, nevertheless, that no inheritor of the same shall become entitled thereto, or be put in possession thereof, until the party shall have attained the age of twenty-one years."

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The testator made a codicil, dated the 29th of March, 1831, as follows:—

"Considering the large sums my three surviving unmarried sisters, as well as my two youngest married sisters, have received annually of me during the greatest part of the interval between the date of my will in July, 1816, and the date hereof in 1831; in consequence, likewise, of the more independent circumstances of my two brothers since the year 1816; I, *George Sayer*, late commander in the chief command of his Majesty's naval forces in the *East Indies*, and now Rear-Admiral, Companion of the Most Honourable Military Order of the *Bath*, do hereby will and direct, that, instead of the whole of the pro-

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perty I may die possessed of being, after my death, divided half-yearly, as expressed in my will, I now desire that the interest of 10,000*l.* stock in the 3*l.* per Centum Consolidated Annuities shall be half-yearly divided amongst the survivors of my brothers, sisters, nephews, and nieces comprised in my will, in the proportions therein specified, from time to time; and I now direct that the interest and dividends of all the remainder of my stock, over and above the interest of 10,000*l.* 3*l.* per Centum Annuities, shall be invested half-yearly as it becomes payable, from time to time, and in like manner the interest and dividends of the invested interest in the 3*l.* per Centum Consolidated Annuities, in order that the same shall accumulate until the expiration of twenty-one years from and after my decease; at the termination of which period of twenty-one years the whole capital sum then standing in the books of the Bank of *England*, in virtue of my will and this a codicil thereto, shall remain to be disposed toward my then nearest of kin in the male line, in preference to the female line, under the conditions and restrictions as in my said will are set forth by me, the said inheritor first paying therefrom the interest of 10,000*l.* 3*l.* per centum stock to the survivors of my brothers, sisters, nephews, and nieces, until the death of the last survivor of them, in the proportions prescribed by my will in their behalf and in behalf of their children, if any, until the death of the said last survivor."

"The memorandums in this paper I expressly wish should be duly conformed to and carried into effect by my executors, trustees, and all parties concerned, from and out of the portions of the three first years' interest, shareable by them, exclusive of one and half year's entire interest immediately following my death, which will be requisite towards the expenses of probate, its duties, and legacy duties."

The testator then gave various specific and pecuniary legacies, and, among others, gave his medals, seals, and other articles, and some articles left him by his great uncle *Valentine Sayer*, and his pictures of his said great uncle and his wife, to his brothers, "to be preserved by them, to descend with the patent and painting of my armorial bearings to the inheritor hereafter of my capital property, and to the descendants who may from time to time succeed thereto."

"I desire that a handsome marble monument may be placed to my memory, close to that of my great grandfather *Valentine*, and great uncle *Valentine Sayer*, within *St. Clement's Church (Sandwich)*, with the inscription as under, and my own arms sculptured thereon; perhaps the cost of it may be 200*l*."

"In memory of Rear-Admiral *George Sayer*, Companion of the Most Honourable Military Order of the *Bath*. His earliest services were in the *East Indies*, from 1788 to 1793; and from that time, he was actively employed in the *British* seas, and twice in the *West Indies* until 1810, when he again served in the *East Indies* until 1817; during the latter period, the chief command of his Majesty's naval forces upon that extensive station twice devolved upon him as commander, which he exercised until his return to his native country after the general peace. Born in this parish on the 13th of November, 1773, died , and lies interred . He was the eldest of three sons of *Benjamin Sayer*, Esq., of this town, who was thirty years collector of his Majesty's Customs here and at Deal."

The testator died in 1831, leaving two brothers and six sisters. His brothers were unmarried, three of his sisters were married. The twenty-one years of accumulation, directed by the codicil, expired in April, 1852, and

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the bill was then filed by the trustees and personal representatives, to determine the question who was then entitled to take the residuary estate under the description of the "then nearest of kin to the testator in the male line in preference to the female line." The several defendants and claimants were, first, *Jane Bradley*, a sister of the testator, and who was then the only survivor of the testator's eight brothers and sisters; secondly, the son of a deceased sister of the testator; thirdly, a cousin of the testator, who was the son of his father's brother; and fourthly, the next of kin of the testator, who claimed under the statute of distributions, on the ground of the uncertainty of the bequest.

Argument.

*Mr. Russell* and *Mr. Dickinson* for the trustees and personal representatives.

The *Solicitor-General* and *Mr. Giffard* for *Jane Bradley*, who, as the only survivor of all the testator's sisters and brothers, was the nearest of kin at the expiration of the twenty-one years. In support of the argument that the gift was sufficiently certain, they cited *Pyot v. Pyot* (a).

*Mr. Follett* and *Mr. C. Hall* for *W. Boys*, the younger, the son of a deceased sister of the testator; and

*Mr. Glasse* for *J. W. W. Boys*, another son of a deceased sister, contended, that "the male line" should be construed as a gift to males only, or to the nearest of kin being males.

*Mr. Chandless* and *Mr. Surridge* for *George Sayer*, a

(a) 1 Ves. 335.

cousin of the testator, and the son of a brother of the testator's father, claimed as being the person who alone perfectly fulfilled the condition of deriving his descent exclusively through an unbroken succession of males: *Bernal v. Bernal* (a), *Oddie v. Woodford* (b), Co. Litt. 27. a.

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Mr. Rolt and Mr. R. Pryor, for the next of kin of the testator at the time of his death according to the Statute of Distributions, relied upon the uncertainty of the meaning of the gift, as illustrated especially by the arguments in favour of the preceding claimants: *Doe d. Smith v. Fleming* (c), *Doe d. Wright v. Plumtree* (d).

The Treatise of the Law of Property as administered in the House of Lords, pp. 263, 271, and *Withy v. Mangles* (e), and *Thomason v. Moss* (f), were cited.—The points taken in the several arguments are all mentioned and commented upon in the judgment.

VICE-CHANCELLOR:—

The peculiar form of the will in this case has certainly presented some degree of difficulty in point of construction; but I think the Court is enabled to arrive at a satisfactory result.

Judgment.  
—

[His Honour stated the will and codicil, observing that the material difference between them in the disposition of the residue was, that, by the codicil, as contrasted with the will, instead of limiting the ultimate disposition, at the expiration of a period which the Court would probably have held to be too remote, namely, after the death of the

(a) 3 My. & Cr. 569.

(b) Id. 584.

(c) 2 Cr. M. & R. 638.

(d) 3 B. & Ald. 474.

(e) 4 Beav. 365; 10 C. & F. 215.

(f) 5 Beav. 77.

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last survivor of the nephews and nieces—the children of the brothers and sisters—he directed the distribution to be made at a period of twenty-one years after his own decease.]

Three parties have severally claimed under the limitation “to the nearest of kin of the male line, in preference to the female line.” They have raised different constructions, by virtue of which they contend that they are the parties who have become entitled to the residue. A fourth party, the next of kin of the testator according to the Statute of Distribution, contends that the whole of this disposition of the residue is involved in such uncertainty that it is impossible for the Court to arrive at any legitimate conclusion; and that the bequest of the ultimate residue has failed in consequence, and is now distributable under the statute, as in case of intestacy.

The Defendant, *Mrs. Bradley*, who was the only surviving sister of the testator, is, under the authorities which have completely settled that point, the nearest of kin. Under a bequest of this character, the parties who take are those actually nearest of blood, and not those who take by representation under the statute. Subject, therefore, to the peculiar qualification contained in this will, at the expiration of twenty-one years, *Mrs. Bradley* being nearest of kin to the testator, and being related to him, as she contends, in the male line, by descent from her father, claims the whole of this fund. There are, then, two sons of a deceased sister, who say that they are the nearest relatives of the testator being males, and that the true construction of this will is, that the testator intended to give the residue of his property to such of the nearest of kin as should be males, and should represent him in that sense. There is, then, another Defendant, Captain *Sayer*, who is a first cousin of the testator, de-



scended from the testator's grandfather, and his contention is, that, under the peculiar language of this will, it must be taken that the testator intended that the person who should inherit his property, as he expresses it, should be one in a continuous line of males—should claim relationship to him in a continuous line of males. Captain *Sayer* is the only person who stands in that position with regard to the testator. These claims are followed by that of the next of kin, who, taking advantage, among other things, of the various suggestions thrown out by the different parties, say the matter is pretty evenly balanced in point of argument; or, if any preference is to be given, it is the construction last suggested; and say, that the Court cannot arrive, under these circumstances, at any construction whatever, and that intestacy must be the necessary consequence.

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Now, with regard to the claim of the next of kin, I apprehend it is quite clear that intestacy is the last result at which the Court would arrive<sup>(a)</sup>, and I avail myself of what has been more frequently, perhaps, of late than formerly said by the Court on that point. So long ago as in the time of Lord *Hardwicke* we find that this course of reasoning was suggested by the next of kin in the case of *Pyot v. Pyot* <sup>(b)</sup>, where a bequest was to the testator's nearest relation of the name of *Pyot* <sup>(c)</sup>, and to his or her heirs, executors, administrators, or assigns for ever. In that case the Lord Chancellor said, "This is a sort of scramble for the estate, and some difficulty arises from what is insisted on by the answer of the persons claiming under the same general right with the Plaintiff, giving colour to the argument of the heir at law from the uncertainty" <sup>(d)</sup>. But after referring

(a) See on this point also, *Bernasconi v. Atkinson*, supra, p. 345.

(c) Or, "of the *Pyots*." And see 15 Ves. 99.

(d) 1 Ves. sen. 336.

(b) 1 Ves. sen. 335.

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to other cases, he says, "But yet, if there is a possibility to reduce it to a certainty, the devise is good." Lord *Hardwicke* then considers the possibility of making the gift certain, and decides in favour of the nearest relations of the stock (as he terms it) of the *Pyots* (a).

Nothing, I think, can be clearer than that where a testator makes a disposition of this peculiar and marked character, whatever may be its construction, he intends to make an efficient bequest, and that it would be entirely to disappoint his intention to deprive his will of effect, and leave the property to go as in case of intestacy. I am obliged, therefore, to scrutinise the several constructions which have been propounded of these testamentary instruments. The only external circumstances I have to take into consideration are the position of the testator's family, who were the relatives, and the fact to which he has alluded in his codicil of his having obtained a grant of arms.

If, in considering the various constructions which have been suggested, I arrive at either of two conclusions, that they are all equally consistent with the intention expressed by the words of the testator, or that not any one of them can be made consistent with those words, I must hold that there was an intestacy; for, in the first place, if they are all equally consistent with the words, it is impossible to arrive at the conclusion which of the three was intended; or, if there is not any one consistent with these words, it is impossible to hold that any operation can be given to the bequest.

There are two things certainly clear as to the testator's intention: the first is, that his primary intention

(a) 1 Ves. sen. 338.

was to give to his nearest of kin, or as the cases have decided, to the one who shall be the nearest relation, not according to the provisions of the statute taking by representation, but the person who shall be positively nearest of kin. It is equally clear he intended to impose a qualification upon the persons who were to take under that limitation, that the nearest of kin should be of the male in preference to the female line. It was not contended, that the next of kin of the female line could take; and the only way in which that construction could be put upon the will must have been by reading "the male in preference to the female line" in a parenthesis. It might then be considered as a bequest to the nearest of kin in the male line in preference to the female line, leaving the female line still to take in case the female should be nearer of kin than the male, giving a preference instead of an exclusion. I do not think that is the true construction, and I have treated the will as being in favour of the male line, exclusive of the female line.

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Now, looking at these two objects of the testator, the first question is, which of the three constructions that have been suggested is most consistent with the words of the will. I will take, in the first instance, the construction which is suggested in favour of the sons of the deceased sister of the testator, claiming, therefore, not in any especial line of descent, but simply as being male representatives of the family (if I may use such an expression), and as therefore entitled in preference to Mrs. *Bradley*, who is the sister of the testator. Their construction must depend upon this, that the words 'in the male line' must be read as exclusive of females, or as being equivalent to a limitation to the nearest of kin being a male. I think it very difficult to arrive at that conclusion; but, certainly, it cannot be arrived at unless there be a clear and distinct

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intention expressed on the face of the will absolutely to exclude females. Is there, then, such an intention apparent on the will, with reference to the disposition to his nearest of kin, independently of the use of the words "in the male line in preference to the female line." Is there, I mean, evidence on the rest of the will to shew, when you arrive at these words, that they were intended to carry into effect an intention to exclude females? When we look at the will, the intention appears to me to be the contrary, I am not now saying what the effect of the words may be, and whether the words themselves may not exclude females, but until we come to those words every intention appears to be to the contrary. The will, it must be observed, refers to the circumstances of the testator's family. He had two unmarried brothers, and he had six sisters, some of whom were married and some were not. The great probability, in such a state of circumstances, was, both the brothers being unmarried, that at any period to which the testator might limit his bequest, he would have some female relation; and, therefore, if he had the intention of excluding them, it might be expected that such intention would be very clearly and precisely expressed on the face of the instrument. Instead of this, we find what appears to me a very marked intention to avoid any reference to sex in the whole of the terms of the bequest. Observe what the words of the bequest over of the property are both in the will and codicil. There is no reference whatever to sex. If the testator had intended to exclude females, having so many female relations, and having referred to nephews and nieces, one would certainly have expected to find it in some shape expressed; but instead of that there is, as it appears to me, even a marked avoidance of it, by the words, first, "nearest of kin," and next, "inheritor." Again, in the will there are the words, "no inheritor to be put in possession." And then again a

very remarkable selection of words, "until the party" shall have attained the age of twenty-one years. If the testator had intended to choose what one may term neutral words, which would avoid a reference to either sex exclusively, it is difficult to imagine any course he could have taken which would be more calculated to produce that effect. You would not have anticipated, from what goes before, any intention to exclude the female line. There is beyond that a point upon the direction for taking the name of *Sayer*, which I shall more particularly refer to when I come to the argument of the parties, who say that the claim must be through a continuous line of males. Looking therefore through the whole will, and finding no intention to exclude females until the words excluding the female line are arrived at, and being of opinion that it is impossible to say that the words "in the male line," whatever may be their sense, intend the same as "being a male," I have no difficulty in concluding that the claim of the sons of the sister in preference to the aunt, who is the nearest relation, cannot be sustained.

The next claimant is Captain *Sayer*, whose claim is founded on his descent through a continuous line of males, and no doubt there is more to be said in his view of the case upon the expression "in the male line," than can be urged on the part of the two sons of the sister. His case was entirely rested upon the effect to be given to the words male line; and it was asked, "what does 'in the male line' mean more or less than 'in a line of males.'"

"In the male line" and "in a line of males" are synonymous, it was said; and if the latter words had been used, there would be little doubt, and the construction to be given to the words used must be the same.

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With reference to this argument, I do not think it is al-

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together to be passed over, that "in a line of males" would not be the same thing as "in *the* line of males." If it had been "in a line of males," you could hardly suggest any other construction than that it must be continuous. If you reduce it to "in the line," it is much the same as "in the male line," and the question still remains of the effect to be given to the words, looking to the whole will. The case of *Oddis v. Woodford* (a) was cited as supporting the claim through a continuous succession of males. But the words in that case were "male lineal descendant." They pointed out the descent, and pointed out male descent. One of the observations of Lord *Eldon* was, that the word lineal must either be surplusage, or, having expressed descent, and male descent, that word must mean something more, which would be a continuous line of males (b). Further than that, when the property arrived at the lineal male descendant it was settled in tail male. Now, taking those two circumstances together, it appears to me there could hardly have been any other conclusion on that will than that the party was to take in tail male, that is to say, through one continuous line of male descent, from the testator down to the party who was to take, and from him onwards in futuro. We find in the will now before me no expression equivalent to the words "male descendant." We find indeed the word descendant in the codicil used as expressive of the parties who were to take after the first taker; but there is nothing in the will to designate the first taker equivalent to the words in *Thellusson's* will, neither is there any thing equivalent to the words "male descent," nor to the ultimate descent of the property in tail male. In the absence therefore of these points of similitude between the two cases, I have to ask myself further, whether there are not also certain provisions in this will different from any thing to be found in

(a) 3 My. & Cr. 584.

(b) Id. 618.

*Thellusson's* will, and leading to a different conclusion. I think the clause, with regard to assuming the surname of *Sayer* only, is one of considerable consequence. The testator directs that the "inheritor," as he has termed him or her, shall assume the name of *Sayer* only, if not of that surname. It was suggested, and it is true, that the party may be descended from a continuous line of males,—necessarily in a line of ancestors that have borne at some time the name of *Sayer*, and which name he may have changed, so that he may possibly bear some other name. A case therefore may be supposed, in which, consistently with the interpretation of its being a continuous line of males, the claimant may not be of the name of *Sayer*. That, however, is not the first and obvious construction of the testator's intention. It suggests a circumstance as occurring to his mind, which does not appear to have occurred in his family. If any one of his immediate ancestors had appeared to have changed his name, it might have raised the question which the argument suggests; but the obvious and immediate construction of such a limitation is, that the testator had in view the possibility that some female might become the inheritor, and in that case he wished her to take the surname of *Sayer*.

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It is said, however, that this clause occurred in *Thellusson's* will, and that the Judges did not attribute any weight to it (a); but that is not so. The limitation in *Thellusson's* will was this, that the person who was to take should use the name of *Thellusson* only,—a perfectly different limitation. The testator in that case seems to have had in view the founding of a family, and to have been proud of his name. He might have thought it possible, that, being a foreign name, and great marriages being likely to be contracted by those to whom he was leaving

(a) 3 My. & Cr. 629, 630.

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so large a provision, those who originally bore his name might feel disposed to change it, and therefore he said "whoever takes my property they shall use the name of *Thellusson*." He assumes that they have that name, and directs that that name alone shall be used. I can well understand why the Judges said in that case, that that particular clause afforded no clue to the construction. That appears to me to be extremely different from the case now before the Court, where there is a distinct limitation, and an assumption that the party has not the surname, with a direction that that surname shall be taken.

It was then said, that the arms clause was also a strong indication that the party was intended to take in the male line only, by a continuous descent of males; and that it was not intended that any females should take. Upon this, it was argued that the party was not directed to apply for arms, but was to bear and use the arms which the testator at any time might have granted to him: and that in the codicil, after the testator had applied for and had obtained a grant of arms, he bequeaths his patent and medal and other things to his two brothers, who were his executors, and directs them to be preserved, to descend with the painting of his armorial bearings to the inheritor hereafter of his capital property, and to the descendants who might from time to time succeed thereto,—intimating, therefore, that the person who took his property would probably be the person to take his arms under that grant; and *Coke Littleton* (a) was cited, to shew that a female was not capable of bearing or inheriting arms. In the passage referred to, however, Lord *Coke* says—that which is every day's practice in the present time, that females may take their arms "in a lozenge or under a curtaine," and their husbands "may impale them, or quarter

(a) Co. Litt. 27. a., 140. b. n. (A).



them with their own;" and I think it is too much to assume, that all these niceties of the law of arms were in the testator's contemplation, whilst the common practice and every day usage must have been before his mind, in which he would have seen that females are continually bearing and using arms. I do not think, therefore, that it can be successfully contended, that the females were altogether excluded, or that there was an intention to limit the property in the male line in the sense thus contended for. Then, if we look to the patent, we find the grant of arms is to the testator himself, and his descendants, and to the descendants of his father. There is no express limitation to males, nor is there any expression which at all confines it. I have looked at it with the view, not of seeing how far it supports the claim of the Plaintiff, but how far it supports the claim urged by the Defendant, Captain *Sayer*, and I do not find anything in that clause which assists the construction he desires to have placed on this will. Looking through the whole of the will, although the words "in a line of males" might possibly, if there had been no other expression, have had the sense contended for, I cannot hold "in the line of males" to mean in a continuous line of males, or that these words were intended to exclude a female from becoming entitled.

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It still remains to be seen, whether a title can be made on behalf of Mrs. *Bradley*. Mrs. *Bradley* contends, that she is the nearest of kin,—that she is in the line of males,—inasmuch as she descends from the testator's father; and the question upon her claim is, in truth, whether a definite sense can be attached to the gift. I am bound, as I have said, to arrive at some construction in preference to deciding for an intestacy; and if the only other intentions that have been suggested are, in the judgment of the Court, displaced, then much of the alleged uncertainty is

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removed; and unless Mrs. *Bradley's* construction be irreconcilable with the words, it must prevail.

Now, in the argument for Mrs. *Bradley*, I think there was a little discrepancy between the opening and the reply of the *Solicitor-General*. In his opening he contended it to be in effect a limitation *ex parte paternâ*; but in the reply, in answer to a question by Mr. *Rolt*, he observed, that he should not contend that a claimant through the grandmother on the father's side would have been entitled to take, but that the preference would be in a longer line of males. I have come to the conclusion that the view taken by the *Solicitor-General* in his opening was the preferable one; and that the real solution of the question is, that the parties take under this limitation, and that Mrs. *Bradley* takes as being nearest of kin *ex parte paternâ*.

It appears to me that the testamentary instrument, and all the circumstances of the family, point to the conclusion to which I have come. The testator was not himself married, nor was he likely to marry, for he makes no provision for any child in his will. Mr. *Chandless* suggested, that, if he had married and had had a child, the effect would have been the revocation of his will; but it may be mentioned, that he had not his own descendants in his contemplation, having made no provision for any child of his own. He must, therefore, have contemplated a deduction of relationship in some way or other through the ascending lines. If it had stood upon the will alone, it might possibly, I will not say how effectually, have been argued, that, having made provision for his brothers and his sisters, and the last survivor, and his nephews and nieces, being the descendants of his brothers and sisters; having thus exhausted his brothers and sisters and their immediate descendants, he had begun to contemplate a

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possible line of descent from the brother on the one side, and the sister on the other; and I confess this, in some degree, gave rise to a difficulty and hesitation in my mind. The difficulty was, whether he might not possibly have contemplated a descent from his brothers in preference to a descent from his sisters. He had pointed to two lines of descent, to possible issue of his brothers, and possible issue of his sisters; and, although it would not be strictly a descent, because there could be no descent from brothers to him, still it might possibly have been what was passing in the testator's mind. When, however, we come to the codicil, I think it is rendered perfectly plain. We find that he no longer exhausts his brothers or his sisters, he no longer places them out of the position of inheriting the property as he terms it, for he limits a period of twenty-one years after his own decease, at the end of which period we must conceive it might be present to his mind, that, by possibility, a brother or sister might be living, and there was no intention apparent on the will to exclude a brother or a sister who should be alive at that period. I do not forget for a moment the direction in the will that has been pressed on the Court, that the person who takes as inheritor is first to pay the interest of the 10,000*l*. Three per cent. Stock to the survivor of his brothers, sisters, nephews, and nieces, until the death of the last survivor. That was urged as a ground for contending that he could not have contemplated the possibility of a brother or a sister taking, inasmuch as they were to be the parties to take, and yet were to pay the interest on the 10,000*l*. There is one obvious answer to this argument in the authorities, which have decided, that, though a person is named as tenant for life of the fund afterwards given to the next of kin, that person will not, therefore, be deprived of his share as one of the next of kin. But I do not think that this case need rest upon any such principle; I think it may rest upon the words themselves, and

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the peculiar position of the 10,000*l*. For, observe what it was. If a brother or sister should take (which, I say, under the codicil the testator must have thought possible,) within the twenty-one years, the interest on the 10,000*l*. would have to be paid, not only to the brothers and sisters themselves during their lives and the lives of the survivors (and, of course, I must assume here that all the brothers and sisters claiming *ex parte paterna* would have taken), but also to the nephews and nieces up to the death of the last survivor after the parties had so taken. It was therefore necessary, that, until the death of the last surviving nephew and niece, to keep the 10,000*l*. totally distinct from the residue, and until the death of the last survivor, it was necessary to have a direction for the payment of interest upon the 10,000*l*. by the inheritor of the property; and although the testator has introduced his brothers and sisters as being the first takers, I apprehend that would not be altogether unreasonable. He might say "I intend, when you take possession of the property, that you shall not immediately hand over the income of the 10,000*l*. to your nephews and nieces. You will still hold it as a severed thing from the rest of the inheritance, during your lives, until the death of the last survivor." It might also go in different shares. The survivor of the sisters, for instance, would continue to receive as a separate thing the income of the 10,000*l*. So again, with regard to the nephews. Therefore clearly on the face of the will, and without referring to the class of authorities which I have just slightly touched on, it is plain and consistent with this codicil, that the testator should mean all his brothers and sisters to take, and at the same time that the codicil should contain the limitation with reference to the peculiar disposition of the dividends on the 10,000*l*.

Are there not, also, other arguments which favour the

view that I am now considering, and which support the claim of Mrs. *Bradley* as taking *ex parte paternâ* and not *ex parte maternâ*? There is this remarkable circumstance, the testator, as I have said, must be considered as having a certain line in his mind. I consider that a point which it is necessary to take into view; but, if he thought his brothers and sisters might take, as under the codicil they clearly might, then the only line in view would be the ascending line, which would become a bifurcated line immediately after his own decease. He had then two lines before him: the line on the father's side, and that on the mother's side, and (although we, perhaps, sometimes impute too much knowledge of law to testators,) he must be taken to have known so much of the law, as that, on his death, there would in fact be two lines. If, then, two lines are before his mind, and I find the words "the male in preference to the female line," the question is, whether it is not perfectly consistent with ordinary language to use those words, although not strictly a legal form of expression, instead of referring to the two lines by the more ordinary words of "my father's side" and "my mother's side." Looking to the succession of the property—at the necessity of its being traced through lines—at the circumstance that his own death opens the two lines of the father and mother—the expression of male line would appear to be used to designate one line so opened, and the expression female line, to designate the other line so opened. Looking to the whole of the testator's will, there is this remarkable circumstance: that you do not find any relation of the mother named;—the codicil mentioning by name several relations of the father, and a great uncle. The testator seems to have looked with some pride to his paternal relatives. There is also this remarkable circumstance with reference to the mother: that, in the epitaph which he has directed to be placed over his tomb, he describes himself as the son of a gentleman of the name of

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*Sayer*, and does not name his mother in that last record of himself. There seems to be a total absence of recognition of the maternal branch, which is not usual where persons designate their parentage; and the will, indeed, appears carefully to omit the name of the mother. The Court, at this moment, does not know her name, or any of her relations. We find, then, this favourable view taken of all those related to the testator on the father's side, without any notice of his relations on the mother's side. We find a period arriving, at which he must have contemplated that his brothers and sisters might take under the clause as to the residuary gift—thus necessarily looking forward to the course of title which would then arise, or, in the event of their being all dead, to the course of devolution in which his estate would proceed; and we find him arriving at a moment when the separation of lines would take place,—the separation by passing through the male line qua the father, and the female line qua the mother.

As opposed to this view of the case, I have to consider the argument on behalf of the next of kin, who, in the first place, take advantage of the various views suggested by the different parties. I have disposed of this part of their argument, by holding the claim of *Mrs. Bradley* to be superior, in point of construction, to that of any of the other parties, and therefore sufficient to displace them. On behalf of the next of kin, it was further said, that it was impossible to give this meaning to the words, as "line" could not be construed to mean "stirpes" or root; and therefore the male line, as descended from the male, was not the construction the Court could adopt. I conceive this to be somewhat hypercritical. I do not think it is too much to say, that the testator may be supposed to have his mind fixed on the notion of descent; and, to be speaking of the male line, or male descent, with reference to the first step which would have directed the channel

in which the descent was ultimately to take place; and the first point of division of the channels is, that of the division into male and female lines.

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The next of kin should have the benefit of the suggestion made by the *Solicitor-General* in his reply, on the possibility of excluding the grandmother of the testator;—that construction, no doubt, is possible. You might take in a line derived from males going up continuously through a series of males. I do not think that is the proper construction; for, I think, if followed out in detail, it would lead to extreme uncertainty—I think a conclusion may be arrived at which leads to no uncertainty; and, if the Court can arrive at such a construction, both preferable to any other and consistent with the words of the will, that construction must be adopted instead of intestacy.

It was then argued, on behalf of the next of kin, that the person contemplated under the will was the person who would come in after the death of the brothers and sisters and all their descendants, at some remote distance of time, and that the person to take under the codicil must be supposed to be the same; that the testator must be supposed, when using the same words, to have the same persons in view in the codicil as in the will. But that cannot be so, for the limitation of time determines everything in this case as to the party who is to take; and if the testator varies the time by the codicil, it cannot be concluded that he has the same persons in his contemplation. It is natural to suppose, that he would himself think it extremely probable that the persons to take within a limited period would be entirely different persons from those to take at a more remote period.

It was then said, that the words throughout were in

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the singular number, and that the testator throughout has intended one party alone to take. It is, to a certain extent, true, that the party to take is referred to in the singular number. "The nearest of kin" are, in this view, ambiguous words—they may be plural or singular; but the word "inheritor" and the word "party" are both in the singular number. At the same time, it appears to me they are both capable of being taken, in the view of the Court, as nouns of multitude, applying indefinitely to classes of individuals, by no means necessarily excluding more than one party. I do not know that one would need authority for that proposition; but the case of *Pyot v. Pyot* (which I have before alluded to) was a bequest in much more expressive singular words; it was to the testator's "nearest relation" of the name of *Pyot*(a), and to *his* or *her* heirs or executors. As far as the strict sense went, nothing could be more clear than an intention to limit to the party in the singular number; yet Lord *Hardwicke*, in commenting upon it, says, that if there had been a necessity to take the devise to relate to a single person, there would be that uncertainty which was contended for, as there were several in equal degree of the name of *Pyot*; but he did not take it so. "Relation," he says, "is nomen collectivum as much as heir or kindred. A devise to *A.* and the heir male of his body is an estate tail"(b). He adds, "I admit that the word 'nearest kindred' is used as nomen collectivum oftener than the other, there being no plural to it (although I have seen it used in the plural in incorrect writings); in common parlance, relation in the singular number is used as nomen collectivum, in the same sense as kindred; and no difficulty arises from the words *his* or *her* in this case any more than where the word heir is used"(c). I have, therefore, Lord *Hardwicke's* opinion, that both the words "rela-

(a) See p. 397, *supra*, n. (c).

(b) 1 Ves. 337.

(c) *Ibid.*



tion" and "heir" would be a sufficient nomen collectivum to let in the whole body of *Pyots*. And, in the same way, here, I think, "nearest of kin" and "inheritor" must be taken to be sufficient to have that effect; and the word "party" cannot but be considered as one equally applicable to that state of circumstances.

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Several of the arguments I have already mentioned as those of the different claimants under the will were also used on behalf of the next of kin; but, at the same time, their counsel pointed out other passages, to shew that those arguments could not prevail; and the Court, therefore, although it may have had the difficulty of dealing with so many ingenious suggestions, has also had the advantage of having all those different arguments answered by those who argued for the next of kin, and whose duty it was to find a satisfactory answer to the several arguments of the claimants. I have rested the conclusion as to the singular number rather upon the observations in *Pyot v. Pyot*, than upon that thrown out by the *Solicitor-General* in reply, in which he pointed out the distinction in the arms clause, when the inheritor was to take the arms with the various differences; because, not only do I think that too slight a circumstance to rely upon, but I think it is sufficiently answered by the coat of arms and its grant. Independently of the different houses, there was a special grant of a peculiar badge of honour to the testator himself, which was not to go to those parties in remainder. He had an opinion of his own services, and considered that he should have a particular mark or badge for them, which should not go to his descendants.

Looking at the whole of the will, I come to this result, that there is no ground whatever for the construction that would let in the sons of the sister in preference to the sister herself; that there is nothing in the will including

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the words "the line of males," which is equivalent to saying "exclusively of females." I think that view is not necessarily supported by the use of the expression "line of males;" and, if not necessarily supported, I think, then, there is very strong evidence on the face of the will to dispute it, in the two circumstances I have referred to—first, the careful absence of any words indicating the gender of the party to take; and, secondly, the direction that a party, if not of his name (which name only would naturally have descended upon a male through the testator's line of males), shall assume that name; thirdly, when I arrive at the conclusion contended for by Mrs. *Bradley* on this point, I think it is consistent with the words, and that it is preferable to the other conclusion, because females, as it appears to me, were intended to take, and not to be excluded; and that it is consistent with the words, because the line of males, instead of the line of females, would be accurately ascertained at the death of the testator, when the time for dividing the inheritance into two lines would arise, and there would be the father's and the mother's line to be considered. We have, moreover, circumstances strongly indicative of an intention to exclude every one on the part of the mother, and an indication of favour, regard, and esteem for all connected with the father.

I think, therefore, that I am bound to pronounce in favour of the testator's nearest relation *ex parte paternæ*, as being one which is consistent, and the most consistent, with the testator's will.

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## BURT v. STURT.

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27th.

A SPECIAL case, on the will of *Stephen Burt*, dated in 1825, whereby, after a devise of certain real estate, and a bequest of a sum of 2000*l.* to his son *William Burt*, and bequeathing the stock on his farms and other property between his two sons *Ayne* and *George*, and also bequeathing to *Ayne* 1000*l.*, and to *George* 2000*l.*, he gave the residue of his estate and effects to trustees, upon trust to pay his debts, funeral and testamentary expenses, and legacies, and invest the remainder on government or real securities; and to pay to his son *Stephen* an annuity of 50*l.* for his life; to his daughter *Sarah* the interest and proceeds of 3000*l.* sterling during her life, and in case of her marriage to her husband for his life, with remainder to her children then living, but if she should have no child, or none which should attain twenty-one, the 3000*l.* to become part of the residue; to his daughter *Elizabeth*, the wife of *Peter Graham*, an annuity of 100*l.* for her life, and after her decease to pay the interest of 2000*l.* Consols for the maintenance of her two children, and to transfer the same to them at twenty-one, but if they both should die under twenty-one the 2000*l.* Consols to become part of the residue; to his daughter *Jane*, the wife of *Edward Porter*, an annuity of 50*l.* for her life, for her separate use, and after her decease the sum of 1000*l.* Consols to be equally divided between her children then living, and if they should die under twenty-one the same to become part of the residue. The testator then pro-

After several devises and bequests of real estate, farming stock, sums of money, and life annuities, to the seven sons and daughters of the testator, nominatim, the testator directed the surplus interest of the residue to be accumulated during the lives of his said children, and the life of the longest liver of them; and, after the decease of the survivor of them, that his residuary estate should be divided amongst all his grandchildren, if more than one, equally; and if but one, then to such only grandchild:—*Held*, that, inasmuch as the direction for accumulation was not intended to raise the portion of any given child of any of the first takers, but was a chance limitation to whomsoever might be

the surviving grandchild at the death of several persons, including uncles and aunts of the grandchild, with whose benefits, under the will, the gift to the grandchild had no direct connection,—the case did not fall within the exception contained in the second section of the *Thellusson* Act, which enables provision to be made for raising portions for any child or children of any person taking an interest under the conveyance, settlement, or devise; and that the direction for accumulation beyond the period of twenty-one years after the death of the testator was therefore null and void.

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ceeded, " And it is also my will and desire, that my said trustees shall and do invest all the surplus of the interest and proceeds of my residuary effects, from time to time as the same shall become due and payable, in accumulation of a capital, in government or real securities, during the lives of my said children, and the life of the longest liver of them; and from and immediately after the death of the survivor of my said children, then it is my will and desire, that all and singular my residuary estates and effects, and the interest and proceeds thereof, and of every part thereof, be equally divided between and amongst all my grandchildren, if more than one, share and share alike, which shall be then living at the time of the death of the survivor of my said children, and if but one grandchild, then to such only grandchild, his or her heirs, executors, and administrators."

The case stated that the period of twenty-one years from the death of the testator expired on the 19th of December, 1848; and that the clear residuary estate of the testator, including the accumulations up to that time, consisted of 7773*l.* 5*s.* 5*d.*, and 12,856*l.* 18*s.* Consols, and a leasehold estate. The testator left his children, *William, Ayne, Sarah, Elizabeth, George* and *Jane*, who were legitimate, and *Stephen*, who was illegitimate, all of whom were named in his will, him surviving. The principal question in the case was: Whether, under the direction in the will for accumulating the surplus interest and proceeds of his residuary estate for the benefit of his grandchildren, such accumulation could be legally made for any and what period subsequent to the expiration of twenty-one years after the said testator's decease, and, if not, to whom such excess of accumulation and surplus interest and proceeds, which accrued after the expiration of the said twenty-one years, belonged.

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Mr. *Baily* and Mr. *Smythe* for the Plaintiffs, five of the legitimate children of the testator; and Mr. *W. M. James* for the son, and for the administratrix of *Jane*, a deceased daughter, who was also the legatee and executrix of the deceased husband of *Jane*.

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Mr. *Follett* and Mr. *Freeling* for the Defendants, the grandchildren of the testator, and also for the executors.

The arguments are all noticed in the judgment. The following cases were cited and commented on with reference to the construction of the *Thellusson* Act (a):—*Eyre v. Marsden* (b), *Bourne v. Buckton* (c), *Elbourne v. Good* (d), *Jones v. Maggs* (e), *Lord Barrington v. Liddell* (f), *Morgan v. Morgan* (g), *Freemantle v. Beck* (h), *Middleton v. Losh* (i), *Shaw v. Rhodes* (k), *Beech v. Lord St. Vincent* (l).

VICE-CHANCELLOR:—

The only point in this case that remained to be decided was with reference to the direction for accumulation contained in the testator's will, by which in effect he directed the residue of his property to be accumulated during the lives of the whole of his "said children," having named several persons in his will (including an illegitimate child whom he designated as his son), and during the life of the longest liver of them, and at the termination of that period

*Jan. 27th.*  
*Judgment.*

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| (a) 39 & 40 Geo. 3, c. 98.               | and see next case, <i>infra</i> , p. 429.                             |
| (b) 4 My. & Cr. 231; S. C., 2 Keen, 564. | (g) 20 L. J., Chanc., 109.  |
| (c) 2 Sim., N. S., 91.                   | (h) 5 Ves. 85.  |
| (d) 14 Sim. 166.                         | (i) 1 S. & G. 61.   |
| (e) 9 Hare, 605.                         | (k) 1 My. & Cr. 135; S. C., <i>Evans v. Hillier</i> , 5 Cl. & F. 114. |
| (f) 2 De G., Mac. & G. 480;              | (l) 14 Jur. 731.  |

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to be divided amongst all his grandchildren, if more than one, equally, and if but one living, then to that only grandchild.

I wished to take some little time to consider my judgment, because the late case of *Lord Barrington v. Liddell* (a) has thrown considerable light upon the construction of the *Thellusson* Act, and I was desirous carefully to abstain from deciding anything in this case which could appear in any way inconsistent with the decision in *Lord Barrington v. Liddell*. Before the decision in that case a good deal of difficulty had arisen upon several parts of the provisions of the 2nd section of the *Thellusson* Act, as to how far the exceptions specified in that Act with reference to accumulations were applicable to particular cases supposed to come within the cases enumerated in that section. As regards the particular subject of portions, the difficulties were, first, as to what was a portion; and secondly, who was to be admitted to be a person taking an interest or benefit under the devise, which is a part of the qualification imposed by the 2nd section upon any gift for the purpose of raising portions for children of parties other than the settlor or of the deviser himself.

With regard to the first question,—what should be considered a portion, several cases have been decided. That of *Eyre v. Marsden* (b) is not perhaps a distinct decision on this point, because the decision in that case rested on another point, which, I apprehend, was quite sufficient to support it, namely, that among the parties in the class to be benefited were to be found the children of persons who took no interest whatever under the prior limitations of the will; but still there is a strong expres-

(a) 2 De G., Mac. & G. 480. (b) 4 My. & Cr. 331; S. C., 2 Keen, 564.

sion of opinion by Lord *Langdale* (a) with reference to whether or not a gift of that peculiar character which existed in *Eyre v. Marsden* could be considered a portion, the gift there being a gift of the residue of the testator's estate directed to be accumulated in the manner there described, after he had given certain partial interests to several parties whose children were provided for in the ultimate disposition of the accumulation. Although Lord *Langdale* adverts to the circumstance, that in that clause are contained parties whose parents took no provision whatever, and therefore, that, the whole gift being to a class, and it being impossible to ascertain what division the testator would have made if he had been aware of the event, the whole gift must fail; yet he also adverted to the circumstance of its being a gift of the residue in this form, namely, not for the purpose of raising a specific portion out of any given fund, but being in truth clearly a direction for the accumulation of the fund itself, in order that the accumulated and aggregate fund so increased might go over to the parties for whom it was originally destined. It was not, therefore, as he conceived, in any sense a portion under the Act, by which term Lord *Langdale* appears to have considered, as I understand his judgment, a sum directed to be raised by means of accumulation out of some other fund, rather than a gift of the fund itself augmented by the accumulations. Besides the case of *Eyre v. Marsden* there were the two cases which have been referred to, *Bourne v. Buckton* (b), before the Vice-Chancellor *Kindersley*, and *Morgan v. Morgan* (c) before the Lord Justice *Knight Bruce* when Vice-Chancellor, the judgments in which, although not turning on a residuary gift, were founded upon the fact

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(a) 2 Keen, 578.

(b) 2 Sim., N. S., 91.

(c) 20 L. J., Chanc., 109.

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of the accumulated fund not being, in the view of those learned Judges, a portion under the Act; shewing, therefore, that each of those learned Judges thought it not sufficient to give a life interest, or indeed any interest to a parent under the will, and then to make a gift to a child, directing that gift to be accumulated, and the whole produce to be handed over at a given time; but, that it was necessary there should be something which would bring the gift within the definition of portions under the Act.

The second question that arose related to the person "taking an interest under the devise," and that was the point which arose before the Lord Chancellor in *Lord Barrington v. Liddell*. It had been contended,—I think it never had been decided, but it had been contended, and the doctrine had been acquiesced in, certainly, as far as one can judge from the dicta contained in the books, by several eminent Judges, that the interest under the devise must be an interest in the particular property which was disposed of and directed to be accumulated. When the case of *Lord Barrington v. Liddell* came before Lord St. Leonards (a), he examined all the cases, and found there was no authority for that proposition, and that the case before him was, in fact, substantially new. That case, with reference to the gift being a portion, was an extremely clear case. It was essentially within the spirit of the Act, and the only contest was, whether you could bring it strictly within the letter, with reference to the parties claiming being children of parties interested under the devise. No thing could be more within the spirit of the Act; for this reason, there was a large family estate belonging to the family of Lord Barrington, which was charged by a previous settlement with a large sum in the way of portions,

(a) 2 De G., Mac. & G. 480.



a sum, I think, of 40,000*l*. The Bishop of *Durham*, by his will, gave a large sum to Lord *Barrington* to build a house upon the settled estate, and then directed that a sum of 15,000*l*. should be set apart, and be accumulated for a given period, which, unless within the exception in the Act, would exceed the period which the Act prescribes; and he ordered those accumulations to be applied towards paying off the portions, that is to say, the 40,000*l*. originally charged on the settled estate. It was, therefore, as plain as possible, that the object of the testator was to raise portions for the children of Lord *Barrington*. If it could have been held in that case, that the gift was not within the provisions of the *Thellusson* Act, it would have been one of the hardest cases that could have been imagined. Lord *St. Leonards* held, that, as to its being an accumulation for raising portions, there could not be a question, the only question was, whether they were the portions of the children of a party taking an interest under the settlement or devise. Lord *St. Leonards* held it was quite sufficient, that the party took an interest under the will in other property, and that the *Thellusson* Act was not to be so limited as to be confined to the persons taking a special interest in the subject-matter of the property devised for accumulation. That was the sole point decided. In the course of that inquiry, no doubt various cases were reviewed by Lord *St. Leonards*, and he threw out observations as to doubts which had suggested themselves in his own mind, with regard to the decision in *Eyre v. Marsden*, unless it could be supported, which he thought it could, from the circumstance of there being a gift to a person whose parent took no interest whatever under the devise. But, I must say this, that the case of *Eyre v. Marsden*, as to the question whether or not it was the case of a portion, was not in any way brought distinctly before the attention of the Court in the argument of the case of Lord

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*Barrington v. Liddell*: it formed no part of the argument. I do not observe that Lord *St. Leonards* in any way refers in detail to the circumstances of that case, or to the circumstances of the case of *Morgan v. Morgan* (a). The only point in *Morgan v. Morgan* before him was, whether or not a specific gift of a legacy to A., and then the accumulation of a totally different fund, would make it an exception within the Act? whether or not the fact of a parent taking a gift of a separate thing,—not of the fund itself,—would make it the case of a child of a parent taking an interest under the devise? That is the sole point that was brought to his attention in each of those cases, and, though he entertained some doubt in *Eyre v. Marsden* on the main point, he ends his judgment, by saying, in effect, that he does not touch any of those cases which proceed upon the question, whether it was portion or no portion. I do not, therefore, think that any distinct conclusion can be deduced from the judgment in *Lord Barrington v. Liddell*, of disapprobation on the part of Lord *St. Leonards*, of the cases decided on the ground of the accumulation not being in itself directed towards paying off a portion.

Now, certainly, on looking at the case of *Eyre v. Marsden*, and at this case, it is evident that this case is very much the stronger of the two, in this sense, that, in *Eyre v. Marsden*, the property was directed to be distributed, at the death of the survivor of the parties taking an interest, among all the grandchildren of the testator living at his own decease. There was a distinct provision in favour of all his grandchildren, that is, for the children of all the parties to whom he had given previous interests. There were certain gifts over, which might have affected or varied

(a) 20 L. J., Chanc., 109, 491.

that provision; but, there certainly appeared a plain and distinct intention in the mind of the testator, to provide for all his grandchildren living at his death, who would be the children of the several parties to take.

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Burr  
&  
Sturt.  
Judgment.

Whatever be the strict sense to be given to the word "portion," which I confess it is not very easy to define, yet it appears to me, that there are cases on the one side and on the other, which are so plain and clear, that one can have no very great difficulty in deciding which is, or which is not, the case of a portion. I think, in *Lord Barrington v. Liddell*, it was a very clear case of a portion; and in this case I confess it appears to me to be as clear that it is not a portion. There may be intermediate cases of difficulty suggested, but I do not think, that, in this particular case, I am required to resort to any great niceness of distinction.

The circumstances under which the *Thellusson* Act was passed are well known. The will of Mr. *Thellusson*, perhaps, did not exactly do that which it has been argued is the very thing to be prevented in this case; for I am not clear there were gifts in that will to all the parents of grandchildren of the testator. I have not seen the will so fully set forth, as to shew that there were. The scheme of that will was to prevent any distribution until the death of the last survivor of all his own children and grandchildren, or other descendants born during his own lifetime, and then the property was to go, in one accumulated fund, among the descendants of his three sons. It is quite obvious, however, that, if the construction contended for in this will be correct, and this is to be treated as a portion for children, then, if the statute had been passed before Mr. *Thellusson's* death, he might have directed his trustees to pay 100*l.* a year to all those parties to whom

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v.

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—  
*Judgment.*

in his will he had given nothing, and then might have gone on and directed the accumulation in exactly the same way he had directed it before. Now, I apprehend the exception in the 2nd section of the statute cannot have been intended to let in a case of that description, and that it must be what the words express, a provision for raising portions "for any child or children of a person taking an interest under such conveyance, settlement, or devise." Let us see in this case how far it can possibly be predicated of the disposition made by this testator, that that has been the object and purpose of his will. He gives certain interests of a very varied description to his different children; and, what is not otherwise than remarkable with reference to this point, is, that, with regard to some of the children, he expressly limits over the interest of particular sums given to them to their children. In that sense he strictly gives portions to his grandchildren. To some of his daughters he gives 2000*l.*, to others 3000*l.*, and he gives the remainder to their children; and, having done that, he directs, not that the interest of the residue shall be accumulated for the purpose of paying portions out of the sum so accumulated, which, I am inclined to think, as Lord *Langdale* observed in *Eyre v. Marsden*, would be the more correct view of the meaning of the statute; but, he directs that the whole fund shall go on accumulating until the death of all his children, in order that it may go in a larger mass to the grandchildren. It is not a gift out of the accumulations of some particular fund, by way of portion or provision for the particular parties taking,—for the benefit of the issue of any one child; but the provision is, that the whole fund shall be accumulated until after the death of all his children, and then shall be allotted out amongst those grandchildren who may happen to be surviving at the death of the last survivor of all his children. How can that in any sense be

Whether by the statute it is not meant to protect accumulations for portions to be paid out of the fund so accumulated, and not out of the whole fund,  
—*quære.*

said to be a provision for raising portions for the children of a person benefited? Possibly, it may be said, that they are literally provisions for children, and that whatever child shall ultimately take, must be the child of some person who has taken a previous benefit. That certainly must be so. But, instead of being in the shape of providing for the portion of any given child, it is a gift to the testator's grandchildren, who may happen, by accident, to survive, not only their parents, but their uncles and aunts, persons with whom, and with whose interests under the will, they have no previous connection. Those grandchildren are to take, and none others. That is simply a scheme of the testator, for the purpose of accumulating his own property into one mass, and handing it over, in that mass, at the remote period of the death of the survivor of a number of persons whom he has mentioned, to two or three, or possibly one favoured individual. It does not seem to me, that, in any sense, or upon any rational construction of the words, I can call that mode of disposition the "raising of a portion" for his children; in truth, it is only the *Thellusson* scheme, arranged in this somewhat less complicated and less extensive shape. If I were to hold this to be a portion for children, it seems to me the result would be, that when any person is minded to make a will exactly like that of Mr. *Thellusson*, he may select as many lives as he pleases, twenty or fifty lives, and he may divide some 200*l.* or 300*l.* a year among all these fifty persons, and then give the accumulations of his estate to the child or children of some one of those persons who may be living at the death of the last survivor of those lives. You have there the very mischief contemplated by the statute. The very object which the statute was levelled at would be thus attained in the simplest possible manner; and I will not say in evasion, but, as I think, in complete contradiction to the words of this exception; for, it appears to me,

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 —  
*Judgment.*

that whatever exact definition we are to give to the word portion, I can safely say it does not mean this; it does not mean the handing over of a given fund to a person who shall by chance be the surviving child from a numerous class of persons, who have a very limited interest given to them in the first part of the will. Whatever sense may be attributed to the word portion, that cannot be its meaning.

The case before the Vice-Chancellor *Stuart, Middleton v. Losh* (a), is not at all similar to this. The case before Vice-Chancellor *Stuart* does, I think, seem in opposition to *Eyre v. Marsden*. In that case there was no fund raised out of the accumulations of another fund for the purpose of making provisions for parties, and then the fund passed over, subject to the direction for accumulation; but it is the fund itself that is accumulated. So far, that case is in opposition to *Eyre v. Marsden*; because, in *Eyre v. Marsden*, Lord *Langdale* seems to have been of opinion, that, where the fund itself was the thing to be accumulated, that was not within the provision for raising portions out of and by means of the accumulation of a fund. In the case before Vice-Chancellor *Stuart*, there was a limitation of 50,000*l.*, in which an interest was given to a parent, and subject to that an accumulation was directed, and the whole fund was to be handed over to the children in one accumulated form; but it is not by any means a case similar to this will. The whole fund was given to the children of the party who was the first taker. It was not an unlimited rambling disposition selecting the children who might be living at the death of the survivor of a number of persons, wholly irrespective of the parents' interest, which is the case here. It was not, as it appears to me, in any shape a scheme or devise for accumulating the property, but

(a) 1 S. & G. 61.

really a *bonâ fide* intention to benefit the children of the particular parent whom he had benefited. I think that is a material distinction.

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v.

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*Judgment.*

I decide the case now before me, not on the ground of its being simply the residue, and therefore indefinite, which, I think, would be a shadowy distinction and one which it would be difficult to follow out,—nor on the ground of its being the whole fund and not merely an accumulation, but upon this ground—that it is not a direction in any shape intended for raising the portion of any given child of any one of the first takers, but is a mere chance limitation to the surviving grandchild, whoever he may be, after the death of a number of persons, with regard to many of whom, as his uncles and aunts, that child cannot be said to be in the direct position of a person intended to be benefited by way of portion after the limitation to his parent.

With regard to the period of accumulation, I have no doubt of the period being during the lives of all his children, including his illegitimate child, under the words “said children.” He gives to “my son *Stephen*,” “my daughter *Mary*,” and so on, naming all; and *Stephen* is designated by a term of relationship, and in no other manner, in the same way as all the others are called “child.” One is called “son,” and others “daughters,” and then, at the termination of his will, he says, “my said children.” As he has made no distinction, it is impossible for me to draw any distinction—the “said children” meaning such children; and, therefore, the limitation is during the lives of all those parties whom he has named as children in his will.

A point was raised in argument on the gift to grandchildren, that it would include all the grandchildren who

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*Judgment.*

might possibly have been children of other children of the testator born after the date of his will. It is not necessary for me to express any opinion on this point, as I have decided the case upon a different ground. I think it may have a bearing in favour of the conclusion I have arrived at. I do not think I should have felt myself justified in deciding the case on that point; but, as I have said, it has a bearing upon the construction of the testator's will; for it shews plainly, that, if he had had any other child, although he had made no other provision for such other child, yet he plainly intended that the child of that child should take as a grandchild, and therefore he had not necessarily contemplated portions for the children of those who took anything under his will.

The costs are disposed of by *Eyre v. Marsden*.

A point was also raised, with regard to the disposition of the income the trust for accumulation of which fails, —whether it goes to the next of kin or to those who took in remainder. I had a strong impression that Lord *Eldon* had had that point under his consideration, and I have found the case. It is not a decision, it is merely what he says in commenting on other points in *Griffiths v. Vere* (a). He says, the undisposed part would go to the heir-at-law or next of kin, just as it might be real or personal estate (b); and the several cases that have thrown this undisposed of portion into the residue are consistent with *Eyre v. Marsden*, and *M'Donald v. Bryce* (c), which have given it to the next of kin, where the portion undisposed of is itself residue.

(a) 9 Ves. 127.

(b) 9 Ves. 133.

(c) 2 Keen, 276.

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See *Viscount Barrington v. Liddell*, Judgment of Sir George J. Turner, Vice-Chancellor, next case.



1862.

VISCOUNT BARRINGTON *v.* LIDDELL (*a*).

June 26th &  
28th;  
July 12th.

THE question was raised by a special case, which is fully set out in the Report before the Lord Chancellor on appeal, 2 De G., Mac & G., p. 480.

The case was argued by Sir *W. P. Wood*, Mr. *Rolt*, and Mr. *G. L. Russell*, for the Plaintiffs; and by Mr. *Chandless* and Mr. *Greene*, for the Defendants. Mr. *Glasse* appeared for the trustees of the term.

VICE-CHANCELLOR (*b*):—

The principal question in this case is, whether the trust for the accumulation of the sum of 15,000*l.* created by the will of *Shute Barrington*, formerly Lord Bishop of *Durham*, was valid beyond the period of twenty-one years from the death of the bishop, or, so far as it exceeded that period, was void, as being contrary to the provisions of the *Thellusson Act*, 39 & 40 Geo. 3, c. 98.

Judgment.

[His Honour then adverted to the fact, that the bishop was the uncle of *George*, late Viscount *Barrington*, and the great uncle of the present Viscount, one of the Plain-

(*a*) This case was not reported in its proper place, in consequence of the result of the appeal. Difficulties which have since arisen upon the same section of the *Thellusson Act* shew that the questions upon it are far

from being exhausted, and the reasoning of Sir *George J. Turner*, V. C., in his judgment, will probably be found of much value in future discussions on the subject. See *Burt v. Sturt*, *supra*.

(*b*) Sir *George J. Turner*.

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tiffs; that it appeared by the will of the bishop, that the seat of the *Barrington* family was at *Beckett*, in *Berkshire*, in which county there were considerable estates belonging to the family; that, by the settlement of April, 1823, made upon the marriage of the Plaintiff Lord *Barrington* with his present wife, these estates were conveyed and settled to the uses mentioned in the case. His Honour also stated the trusts of the term of 2000 years; the will of the late Bishop (a); and that there had been issue of the marriage ten children, several of whom had attained twenty-one, so that the portions raisable under the term amounted to 40,000*l*.]

The 15,000*l*. bequeathed by the will of the Bishop upon trusts for accumulation having been duly invested and accumulated, the accumulated fund amounted in value on the 24th of March, 1847, the expiration of twenty-one years from the death of the Bishop, to 35,622*l*. 3*s*. 10*d*., and now amounts in value to 43,643*l*. 8*s*. 4*d*.; and the accumulated fund having thus, at the expiration of the twenty-one years, been insufficient to exonerate the family estates from the portions charged upon them, the Plaintiffs, who are interested in the exoneration of those estates, contend that the direction for accumulation contained in the will was valid and effectual beyond the period of twenty-one years. This question depends entirely upon the construction of the statute 39 & 40 Geo. 3, c. 98; and it being clear that the accumulation is struck at by the 1st section of the statute, it is only necessary to consider whether it falls within the exception contained in the 2nd section. The only part of the section which can affect the present question is that which relates to accumulations for raising portions for children of persons

(a) 2 De G., Mac. & G. 483.

taking interests under any conveyance, settlement, or devise. The question, therefore, is narrowed to this,—whether the trust created by this will is, within the meaning of this statute, a provision for raising portions for the children of a person taking an interest under any such conveyance, settlement, or devise, as was meant to be referred to by the statute.

Three points appear to me to be involved in this question: 1st, to what portions; 2ndly, to what conveyances, settlements, and devises; and 3rdly, to what interest in the parent whose children are to take the portions, was this section of the statute intended to refer. These points must, I think, be determined by the terms in which the statute is expressed, and by what may be collected to have been the object of the exceptions introduced by the section in question. The terms in which the statute is expressed do not appear to me to throw any light upon the question, as to what portions this section was intended to refer,—whether it was intended to refer exclusively to portions to be raised under the instrument creating the trust for accumulation, or exclusively to portions executed by antecedent instruments, or was meant to embrace both these classes of portions; and I do not find it necessary for the present purpose to determine that question. I have no hesitation, however, in stating, that I wholly dissent from the opinion expressed by the late Vice-Chancellor of *England*, that the exception as to portions contained in this section applies exclusively to portions created by antecedent instruments. From the purview of the statute, I am much inclined to think that it was meant to apply only to portions created by the instrument directing the accumulation; but there are two cases in which it has been treated as applying to both classes of portions, and I bow to the authority of those cases, and therefore proceed to deal

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*Judgment.*

The exception as to portions does not apply exclusively to portions created by antecedent instruments.

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The conveyances, settlements, and devises, and the particular interests of the parents of children taking portions to which the statute refers.

with the portions in the present case as being portions within the meaning of the exception, although created by an antecedent instrument.

Dealing with the case upon this footing, I think that the terms of the statute, when examined, go far to shew to what conveyances, settlements, and devises, and to what description of interest in the parents whose children are to take the portions, the section in question refers. The 1st section of the statute recites, that it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be subject to the restrictions thereafter contained; and it enacts, that no person shall by any deed, surrender, will, or codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated, for any longer term than the period specified; "and in every case where any accumulation shall be directed otherwise than as aforesaid, such directions shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated, contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if no such accumulation had been directed;" and thus it is clear, that what the legislature had in view was to restrain the accumulation of income of any real or personal estate by any settlement or disposition by deed, surrender, will, codicil, or otherwise; and it is to be observed, that, among the periods beyond which accumulation is prohibited, is the minority of any person who, under the uses or trusts of the deed, surrender, will, or other assurance directing the accumulation, would for

the time being, if of full age, be entitled to the income directed to be accumulated; and the legislature therefore must also have had in view that other uses and trusts besides the mere trust for accumulation might be contained in the instrument by which the accumulation was directed.

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*Judgment.*

The views of the legislature being thus ascertained from the 1st section, they must of course furnish a guide to the construction of the 2nd section, which is a mere exception from the first; and following this guide in the construction of the 2nd section, I think there is less difficulty upon it. Taking, for instance, the case in question, the exception of any provision for raising portions for any child or children of any person taking any interest under any such conveyance, settlement, or devise; what is meant by any such conveyance, settlement, or devise, but any conveyance, settlement, or devise of any real or personal property which contains directions for the accumulation of income, and under the uses or trusts of which some other persons, whose children are to take the portions, take some interest in the real or personal estate, the income of which is directed to be accumulated? That the interest referred to means an interest in the real or personal estate, the income of which is directed to be accumulated, follows, I think, from this, that it is an interest under a conveyance, settlement, or devise of such real or personal estate. The doubt which has hung over the construction of this part of the section, has, I think, arisen from a mistaken reading of the word "such," which has been read as if it referred to the particular instrument of conveyance, settlement, or devise directing the accumulation; whereas it refers, as I conceive, to any conveyance, settlement, or devise of any real or personal estate, whereby an accumulation of income is directed, the word

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The antecedent referred to by the word "such" conveyance, &c., in the 2nd section of the Thellusson Act.

"such" being descriptive of the object of the instrument, and not of the instrument itself; and this falls in with the language of the statute, for if the word "such" be read as descriptive of the instrument and not of its object, there is no antecedent to which it can refer, there being no previous user of the words conveyance, settlement, and devise.

It was argued on the part of the Plaintiffs, that, in the case of a conveyance or settlement, where the parents took an interest under it in other property than that which was directed to be accumulated, it could not be said that they did not take interests under the conveyance or settlement, and that the same rule of construction must be applied to the word devise, contained in the same clause; and this is no doubt true. But the whole force of this argument rests upon the word "such" applying to the instrument, and not to the object of it, to which, as I think, it applies.

It was also suggested, that the exception contained in this section as to provisions for the payment of debts, extended to provisions for the payment of the debts of any person; and that a liberal construction ought therefore to be given to the like exception in favour of portions. But I think this argument is also founded in mistake. I think that the words "other person or persons," as used in this section, were meant to authorise accumulations, not for the payment of debts of any person or persons, but only for payment of the debts of the person or persons directing the accumulation to be made. The words "grantor, settlor, deviser, or other person or persons," in this section, referring directly to the words of the 1st section, "that no person shall by deed, surrender, will, codicil, or otherwise, settle or dispose," and the words "other person or

The provision for payment of the debts of the "other person or persons" does not refer to the debts of any person or persons, but only of the person or persons directing the accumulation to be made.

persons" being relative to the words "or otherwise." I am of opinion, therefore, that, upon the true construction of this statute, only those cases in which the parent takes an interest in the real or personal estate, the income of which is directed to be accumulated, fall within the exception in favour of the provisions for portions of the children of persons taking interests; and I think that a consideration of the nature of the exceptions contained in the 2nd section of the statute goes far to justify the conclusion, that this was the intention of the legislature; for all the exceptions contained in that section, except the exception as to timber, which may be accounted for on other grounds, have reference to positive moral duties, either the payment of debts, or the providing for children; and it may well be, that the legislature intended to encourage the performance of such duties, and to enable settlers to enforce them by deductions from, or postponement of, the interests of those on whom the discharge of the duties would naturally rest. If, under the colour of a trust for this purpose, or for any other of the purposes excepted by the statute, extravagant accumulations should be directed, and merely colourable interests given to parents, the arm of this Court will probably be found long enough to defeat such schemes.

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The parent must take an interest in the real or personal estate, the income of which is directed to be accumulated, to bring the case within the exception.

The opinion which I have formed upon the construction of the statute being as above stated, the only remaining question which can affect the period of accumulation is, whether the present Lord *Barrington* can be considered to take any such interest in the fund to be accumulated as will warrant the extension of the period beyond the duration of twenty-one years from the death of the bishop; and I am of opinion that he does not. He certainly takes no direct interest in the fund; and although he may be said to be indirectly interested in it, inasmuch as he has

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*Judgment.*

power to appoint the portions in his lifetime, and upon his exercising the power, as he has already done, the appointed fund becomes a charge upon the estate, the interest of which he is bound to keep down, I do not think that this is such an interest as was contemplated by the statute. If this exception were founded on such an interest in the parent, why was it not extended to all portions charged on estates, whether created by the parent or not, and why not indeed to all charges upon estates? But it is clear that this was not intended. Besides, it is in the highest degree improbable that the legislature should have contemplated the case of portions payable in the parent's lifetime.

Upon the whole, therefore, I am of opinion, that the accumulation of the 15,000*l.*, directed by the bishop's will, is not good beyond the period of twenty-one years from the time of the bishop's death.

The next question which arises upon the case is, whether the trust fund which had accumulated at the expiration of the twenty-one years is now applicable in exoneration of the estates comprised in the 2000 years term from the mortgage debts of 533*l.* 3*s.* and 721*l.* 14*s.* and the interest thereof, and whether or not from any other parts of the 40,000*l.* This appears to me to be a question of some difficulty; but I am of opinion, that, under the peculiar constitution of this trust, as affected by the operation of the statute, no part of the accumulated fund is now applicable, or can, until the death of the present Lord *Barrington*, be applied in exoneration of the estates comprised in the term. The testator has, in the events which have happened, expressly directed the fund to be accumulated during the life of the present Lord *Barrington*, and has declared, that, upon the completion of the



accumulation "aforesaid," which would be upon the death of Lord *Barrington*, the trustees shall stand possessed of the accumulated fund, in trust to apply it in payment of the portions when and as the same shall become payable, and in exoneration of the estates charged therewith; and under this trust I apprehend that the accumulation could not have been stopped by the application of any part of the accumulated funds in payment of portions which became payable in Lord *Barrington's* lifetime. What the testator eventually looked to was the payment of the portions upon the death of Lord *Barrington*, when in the ordinary course they would become payable. He was not looking to the benefit of Lord *Barrington*; but then the statute has intervened, and has not only stopped the accumulation, but has provided that the income directed to be accumulated shall go to the persons who would have been entitled thereto if the accumulation had not been directed. The case, therefore, is put in this position, that at the end of the twenty-one years there is an accumulated fund, which is to be applied at a future time, and the income of which is in the meantime to go to the persons who would have been entitled to it, if the accumulation had not been directed; and in this state of circumstances, I do not see how it is possible that any part of the fund can be immediately applied. The difficulty which I have felt upon the point is this: whether, inasmuch as if the accumulation had reached to 40,000*l.* within the twenty-one years, it would then have ceased under the provisions of the will; and inasmuch as it might then well have been said, that the accumulation would have been complete, and the fund applicable to the payment of the portions, the same argument might not apply to the accumulations up to the period when they were stopped by the statute; but I think the answer to this difficulty is, that, in the case supposed, of the accumulation reaching the 40,000*l.* within the

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twenty-one years, the statute would never have come into operation, and there would have been no statutory provision for the application of the income; but that in the case which has happened, of the accumulation not reaching the 40,000%. within the twenty-one years, the statute has prescribed the application of the income. My answer, therefore, to the second question is, that no part of the accumulated fund is now applicable to the payment either of the mortgages referred to or of any part of the portions.

The answers to the preceding questions leave no difficulty as to the remaining points. The answer to the third question must be in the negative; and to the fourth, that the income already accrued and to accrue from the fund accumulated at the expiration of the twenty-one years, belongs to the residuary legatees of the testator, until the death of the present Lord *Barrington*.

1853.  
 Feb. 9th.

### KENNEDY v. KENNEDY.

The testator gave all his household furniture, linen, wearing apparel, books, plate, wines, fixtures, statues, china, horses, carriages, and every thing in his house, to trustees, of whom his wife was

**A CLAIM.**—The question arose on the will of *Langford Kennedy*, which was in the following words:—

“I give, decree, and bequeath all and every my household furniture, linen, wearing apparel, books, plate, wines, fixtures, statues, china, horses, carriages, in short, every thing in my house and elsewhere; also, any sum or sums

one, and directed that all his household property “as aforesaid” should, after his decease, be sold, “with the exception of such articles, whatever they be, that my dear wife may desire to retain for her own use; which I hereby empower her to appropriate to her own use.”—*Held*, that this bequest did not enable the widow to take the whole of the household property, but intimated a confidence that she would not take the whole; that she was empowered to make her selection as well from amongst the statues, pictures, and ornamental articles as from the ordinary furniture; and that she was entitled absolutely to the articles which she might select.

of money which may be in my house, or to be due to me at the time of my decease; also, all my stocks, funds, and securities for money, book debts, money due on bond, bills, notes, or other securities, and all and every other my estate and effects whatsoever and wheresoever, both real and personal, whether in possession or reversion, remainder, or expectancy, unto my dear wife *Alicia*, my dear brother *Charles*, and *J. P. Williams*, and the survivor of them, and the executors and administrators of such survivor, upon trust, for the following purposes—namely, I decree, that, as soon after my decease as may be practicable or advisable, all my household property, as aforesaid, may be disposed of by public sale or otherwise, as to the said trustees may seem fitting, with the exception of such articles, whatever they be, that my dear wife may desire to retain for her own use, which I hereby empower her to appropriate to her own use.”

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—  
*Statement.*

*Mr. Rolt* and *Mr. Walford* for the Plaintiffs, who were the infant children of the testator, submitted, that the widow was not entitled to select articles of mere ornament, such as pictures and statues; was certainly not entitled to take the whole of the furniture in the house in *Devonshire-place*; and was only entitled to the use for her life of such articles as she might select, except such things which were by their nature consumed in the use.

*Argument.*  
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*Mr. Vance*, for some of the parties interested in the event of the death of the children, contended that the articles to be selected by the widow should be only such as were adapted to personal ornament.

*Mr. Prior* appeared for the trustees.

*Mr. Bacon* and *Mr. Vaughan Johnson*, for the widow, argued, that she had a power of selection unlimited in

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extent, and was entitled to the absolute property in the things which she might choose to take.

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*Judgment.*

The VICE-CHANCELLOR said, the question was one of some little difficulty. He had no doubt that the "household property" referred to the articles enumerated in the will, from the word "furniture" down to the word "house." The question, then, was, what was comprehended in the exception of the articles that the wife might desire to retain. It was said, that she might retain the whole, and that the direction to sell meant only this: that the executors should sell the property if the widow did not take it. He thought that the testator intimated a confidence in his wife, that she would not desire to take the whole, but would make a selection. It was then argued, that the articles intended for the wife could not be statues, pictures, and objects of mere ornament; but the Court could not make such a distinction. He could not say such articles were not of use in the station of life of these parties. The testator had probably considered that his house in *Devonshire-place* would be disposed of, and such things might be of use, within the testator's meaning of that expression, in any other house which the widow might occupy. The next question was, whether the widow was entitled to the articles which she might select absolutely, or only for her life. These things were excepted out of the direction for sale, and he thought they were given to the wife as her absolute property.

1853.

OPPENHEIM v. HENRY.

Feb. 26th.

THE principal question arose on the effect of the following bequest of the residuary estate of the testator:—

“I desire and will the remaining residue to be appropriated in manner following,—say as soon as conveniently can be after my decease, to be turned into cash, and brought into the funds, stock 3½ per cent. Consols, in the names of my executors hereinafter named, and to be held by them in trust for all my grandchildren, to be divided equally among them at the end or expiration of twenty years after my decease, and the interest by the purchase of 3½ per cent. Consols stock, to accumulate till that time.”

A bequest of residuary estate to be invested in Consols, and to be held by the executors in trust for all and every the grandchildren of the testator, to be divided equally amongst them at the expiration of twenty years after his decease, held to confer immediate vested and transmissible interests to the grandchildren living at the death of the testator, subject to be opened and let in grandchildren who might be born before the expiration of the twenty years.

Mr. *Chandless* and Mr. *J. H. Palmer* for the Plaintiff, an infant grandchild, born after the testator's decease, and before the twenty years had expired, mentioned *Parker v. Golding* (a).

Mr. *Russell* and Mr. *Cole*, for the grandchildren of the testator living at his death, contended that such grandchildren only were entitled. They did not controvert the case of *Lord Bindon v. Earl of Suffolk* (b). If there had been an intervening interest, the class would not be ascertained until the termination of that interest; but here no interest intervened. The gift was directly to the grandchildren, which is construed to mean those who are alive at the death of the testator: *Horsley v. Chalonier* (c). In *Burrell v. Baskerfield* (d), *Chevaux v. Ainslabie* (e), *Butler v. Lowe* (f), a testator gave legacies to

(a) 13 Sim. 418.

(b) 1 P. Wms. 96.

(c) 2 Ves. sen. 84.

(d) 11 Beav. 525.

(e) 13 Sim. 71.

(f) 10 Sim. 317.

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 }  
 OPPENHEIM  
 v.  
 HENRY.  
 —  
*Argument.*

each of the children of his nephews and nieces begotten and to be begotten; and it was held, that the children of the nephews and nieces born after the testator's death did not take under the bequest: *Davison v. Dallas* (a), *Storrs v. Benbow* (b), *Murray v. Tancred* (c).

Mr. *Shapter*, for the executors, submitted, on behalf of unborn grandchildren, that there was no gift to any grandchild to take effect until the expiration of twenty years from the death of the testator.—He cited *Beck v. Burn* (d).

*Judgment.*  
 —

The VICE-CHANCELLOR, with reference to the argument for confining the gift to grandchildren living at the expiration of the twenty years, said, that the cases which were referred to in support of the argument for postponing the gift until that time, were cases in which the gift was connected with the period of division. The strongest cases in this form were, perhaps, those in which the gift was "to children on attaining a certain age." There, no doubt, the gift was coupled with the period of distribution. In some of those cases it might possibly have been contended, that the existence of the life interest was the only reason for postponing the division. He had no difficulty in holding, that a gift of Stock in trust for all the grandchildren of the testator, to be divided equally amongst them at the period of twenty years from the time of his decease, was a vested interest in the grandchildren of the testator. The only question, then, was, in what grandchildren the gift vested; and upon this he was clearly of opinion, that the grandchildren who were living at the death of the

(a) 14 Ves. 576.

(b) 2 My. & K. 46.

(c) 10 Sim. 465.

(d) 7 Beav. 492.

testator, and those who were born afterwards before the period of distribution, were entitled.

1853.  
 OFFENHEIM  
 v.  
 HENRY.  
 Minute.

DECLARE, that, according to the true construction of the residuary bequest in the will of &c., all the grandchildren of the testator, who were living at the time of his death, took immediate, vested, and transmissible interests in his residuary estate, subject to be opened and to let in any grandchildren of the testator who may be born before the expiration of twenty years from the date of his decease.

CHOYCE v. OTTEY.

March 17th.

A SPECIAL CASE.—The questions were, whether a settlement made by *Thomas Ottey*, in February, 1841, affected his interest in personal estate, which he acquired under a deed made by his father in December, 1834; and whether his interest in such personal estate passed, upon the death of the father (who survived him), to the administratrix of *Thomas Ottey*, or to the trustee of the settlement of 1841.

By the deed of 1834, the father assigned all the personal estate and effects of or to which he was interested or entitled, to trustees, for himself for life, and after his decease, as to certain furniture and effects, in trust for his sons *Thomas* and *John* absolutely; and, as to the residue, in trust to pay his debts, funeral and testamentary expenses, and retain two sums of 250*l*. for his two daughters, and then pay his other legacies, amounting to 800*l*., and then to transfer the residue of the personal estate to his sons *Thomas* and *John*, their executors, administrators, and assigns, as tenants in common. *Thomas Ottey* executed the settlement of February, 1841, whilst his father was

*A.*, who, under a deed made by his father, was entitled, upon his father's death, to a moiety of his personal estate, assigned to trustees in these words—"all the property of which he now is or may stand possessed, both real and personal, and now consisting of one note of hand for 120*l*., one other note of hand for 40*l*., one cottage in his own possession, sold to *S.* at his decease for 155*l*., two other cottages in the occupations of *F.* and *W.*" upon certain trusts, for his wife and relations. *A.* afterwards died in the lifetime of his father.

Upon the death of the father, *held*, that the trustees under *A.*'s assignment were entitled to take under that instrument the moiety of the father's personal estate.

entitled to take

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 CHORCH  
 v.  
 OTTEY.  
 ———  
*Statement.*

still living, whereby he assigned his property to trustees, by this description:—"All the property of which he now is or may stand possessed, both real and personal, and now consisting of one note of hand for the sum of 120*l.*, one other note of hand for the sum of 40*l.*, one cottage in his own possession, sold to Mr. *Richard Surgeon*, at his decease, for the sum of 155*l.*, two other cottages in the respective occupations of *Thomas Fletcher* and *Joseph Woodward*," upon certain trusts, for the benefit of his intended wife and certain other persons.

*Thomas Ottey* died in 1843, and the father died in 1850. The Plaintiff in the special case was the surviving trustee under the deed of December, 1834, who sought the opinion of the Court as his guide in the disposition of *Thomas Ottey's* moiety of his father's personal estate; and the Defendants were the widow and administratrix of *Thomas Ottey*, and the surviving trustee under the settlement of February, 1841.

*Argument.*  
 ———

Mr. *Wickens* for the Plaintiff.

Mr. *Daniel*, for the administratrix of *Thomas Ottey*, argued, that the enumeration of certain specific property and choses in action defined the extent of the assignment, and excluded property which was not so enumerated; and if the words of description had not this effect, yet that the settlement did not comprise the reversionary interest of the settlor in the property in which his father had then a life estate, and in which no interest fell into the possession of the son until the death of the father, which happened after the son's settlement and death. That the settlement was not intended literally to comprise everything, was clear, from the fact, that it contained no mention of goods and furniture then actually in the possession of the settlor.



Mr. A. Smith, for the trustee of the settlement of 1841, argued, that, although the enumeration of the personal estate was defective, the defect did not abridge the generality of the first term, "all the property of which he is or may stand possessed." *Veritas nominis tollit errorem demonstrationis*: *Burton Comp.* pl. 560 et seq.; *Stukeley v. Butler* (a), *Wrotesley v. Adam* (b).

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CHOYCE  
v.  
OTTEY.  
Argument.

The VICE-CHANCELLOR said, that the words of the settlement were general; and he could not restrict them so as to exclude the reversionary interest to which the settlor was entitled under the deed of 1834. There might have been some force in the argument upon the words of the assignment referring to property of which the settlor was or might be possessed, if applied to property which he could not possibly come into possession of during his life—to a sum to become due upon a policy of insurance on his own life, for example; but the property in question was not of this nature. The answer to the questions must be, that the interest of *Thomas Ottey* in the personal estate comprised in the assignment of 1834 passed to the trustee of the settlement, and not to the administratrix.

Judgment.

(a) Hobart, 168.

(b) Plowd. 191.

1853.

*April 22nd & 23rd.* IN THE MATTER OF THE TRUST BEQUEST IN THE WILL  
OF MARIA LANGHAM.

A bequest of shares in a Canal Navigation Company for charitable uses, *held to be good*; but a bequest of securities upon the tolls, rates, and duties, and upon the general estate of the Company, created by assignment thereof by way of mortgage, as being a charge upon land,—*held to be void*, under the statute 9 Geo. 2, c. 36.

THE testatrix, after giving certain life interests in her residuary estate, gave one half of the several monies, shares, stocks, and premises therein mentioned, in case of the death of the tenants for life without issue, to the treasurers, stewards, or managers for the time being of the charity for the relief of the widows and orphans of poor and necessitous clergymen within the diocese of Peterborough; and one-eighth of the said several monies, shares, stocks, and premises unto the president, vice-president, or treasurers for the time being of the *Magdalen Hospital* in *St. George's Fields*; and all the remainder of the moneys, shares, interest, and premises aforesaid, being a fourth part thereof, unto the treasurer or treasurers for the time being of such hospital or infirmary at *Northampton*, as should then be established at *Northampton*, whether the same was a county hospital or infirmary, or a general hospital or infirmary.

The testatrix died in 1793.

The property comprised in this bequest consisted of 1285*l.* 19*s.* 8*d.*, 3*l.* per Cent. Consolidated Bank Annuities, of three  $\frac{15}{100}$  shares in the *Oxford Canal Navigation Company*, and of the sum of 1000*l.* secured by assignment of the tolls of the said *Oxford Canal*.

In December, 1842, the mortgage on the tolls of the *Oxford Canal* was paid off, and the produce invested by the trustees on other mortgages, and ultimately in Consols.

The *Oxford Canal Navigation Company* and the securities by way of mortgage upon their tolls were created by authority of Parliament. The company were empowered by Act of Parliament (a) to raise a sum not exceeding 150,000*l.* in 1500 equal 100*l.* shares; and it was provided by the same Act that the said shares should be deemed to be personal estate, and be transmissible as such, and not of the nature of real property; and each shareholder should be entitled to receive, after the navigation should be completed, the entire and neat distribution of one fifteen hundredth part of the profits and advantages to accrue by virtue of the sum to be raised by the authority of the Act. By another Act (15 Geo. 3, c. 9) the company were authorised to borrow, at interest, a sum not exceeding 70,000*l.* on the credit of the navigation, and were empowered under their common seal to assign over the navigation, undertaking, and premises, and all such tolls, rates, and duties as were vested in them by virtue of the Act, as a security for any sums of money to be borrowed, with interest. The Act specified the words of assignment to be used, which expressed to assign to the lender (by name), his executors, administrators, and assigns, "all and singular the tolls, rates, and duties" vested in the company; "and also the said navigation, undertaking, and premises, and all the estate, right, title, and interest" of the company therein, to hold to (the lender), his executors, and administrators, until the sum mentioned, with certain interest, should be repaid. And it was enacted by the same Act, that all persons to whom such assignments should be made should be equally entitled to their proportion of the tolls, rates, duties, and premises, according to the respective sums advanced.

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 In re  
 LANGHAM'S  
 TRUST.  
 Statement.

The trustees were advised, that a question arose whe-

(a) 9 Geo. 3, c. lxx. Local and Personal.

1853.

In re  
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TRUST.

Statement.

ther the residuary gift to the charities, so far as the same was constituted of chattels real, was not void under the statute 9 Geo. 2, c. 36, and did not belong to the residuary legatees; and they therefore transferred the stock into Court under the Trustee Relief Act,

The petitioner, who was the treasurer of the Charity for the Relief of the Widows and Orphans of Poor Clergymen of the Diocese of *Peterborough*, applied for a division of the fund amongst the charities, on the ground that the bequests were not void under the Act.

Argument.

Mr. *Rolt* and Mr. *Shapter*, Mr. *Baggalay* and Mr. *Pirie*, for the petitioner and the other charities.

Mr. *Baily* for the residuary legatees; and

Mr. *Elderton* for the trustees.

The cases cited were the same as those referred to in the argument of *Robinson v. The Governors of the London Hospital* (a); and also the cases of *Bligh v. Brent* (b), and *Doe d. Graham v. Hawkins* (c).

Judgment.

The VICE-CHANCELLOR, advertng to the conflicting decisions which had been cited on the question, whether property of this nature, created in different forms, was within the restrictions of the Mortmain Act (d), distinguished between the cases where the property, like a common bond or a policy of insurance, gave to the party entitled to it no direct and primary right to take any interest in realty, which might be possessed by the persons or bodies bound

(a) *Supra*, p. 21.

(b) 2 Y. & C. 268.

(c) 2 Q. B. 212.

(d) 9 Geo. 3, c. 36.

by the instrument, but gave him only a right to sue upon the instrument, and to recover in that suit against the obligees or covenantees, and where the instrument gave the party a direct and primary right or charge upon the land or upon the rates or tolls issuing directly from the land. A shareholder in the Canal Company had no direct right to any portion of the tolls or rates paid for the use of the canal; his right was only to a proportionate part of the profit or income of the company. It had been argued, that the Act incorporating the Canal Company had declared that the shares should be deemed personal estate; and that, if the shares themselves were personal estate, the securities created by the company upon their property must be also personal estate; for it was said, that the fruit must be of the same nature as that from which it grew. His Honour said, that he did not think that the cases in which shares had been held not to be within the restrictions of the Mortmain Act, had proceeded upon the declaration of the legislature in the incorporating Acts, that they should be transmissible as personal estate, but upon the fact that the shares themselves gave the holder no direct right to any part of the rates or tolls which were levied, and gave him a right only to his share as a partner in the general profits of the undertaking (a). It was, however, different in the case of an express assignment of the tolls which the company were entitled to levy. The tolls did not belong to any individual shareholder, but they belonged to the company; and the company, by their assignment, placed their mortgagee in the same position, and gave him the same right as they had themselves. In certain events the mortgagee would be entitled to have

1863.

In re  
LANGHAM'S  
TRUST.

Judgment.

(a) See an argument on the estate of a partner in the partnership property presented in another form, *Custance v. Bradshaw*, 4 Hare, 315.

1853.

*In re*  
**LANGHAM'S**  
**TRUST.**

*Judgment.*

a receiver of the tolls appointed; and a party who personally, or through the hands of a receiver, might take the tolls, had acquired a direct interest in land, within the meaning of the statute. Without going to the extent of some former cases upon this point, he knew of no authority for saying, that a security which gave a direct right or charge upon property, which was in fact land, could be made the subject of a charitable bequest.

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*Misde.*

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**DECLARE** the canal shares bequeathed to the charities to be pure personalty, but the mortgage of tolls to savour of realty. Declare that William Stowe, as the legal personal representative of Phillis Langham and Frances Ann Langham, the residuary legatees of Maria Langham, the testatrix, is entitled to, so much of 2829*l*. 12*s*. 8*d*. Consols, in the name &c., and to so much of any cash in the Bank, standing &c., as represents the mortgage of the tolls, subject to the proportion such mortgage was liable to bear towards payment of the legacies bequeathed by the will of the said testatrix, and the expenses paid by her executors in August, 1839, with reference to the then value of the stock in the Bank and the canal shares, of which the other portion of the said testatrix's estate consisted. And declare that the charities are entitled to the residue of the said fund in Court, in the proportions in the said testatrix's will mentioned.

1853.

## CLAYTON v. ILLINGWORTH.

Feb. 15th.

**A** CLAIM for the specific performance of an agreement in the following words:—

“Memorandum, 28th of January, 1852. *John Carter*, of &c., agent for *J. N. Clayton, Esq.*, and *John Illingworth*. The said *J. Carter* agrees to let, and the said *John Illingworth* agrees to take, all that messuage late in the occupation of *W. Broadbill*, and thirty-eight acres of land, more or less, at the rent of 80*l.* a year, payable on the 2nd of August next and the 2nd of February, 1853, and so on half-yearly, to have the land from the 2nd of February next, and the buildings from the 13th of May next, and to abide by the agreement in all respects as entered into by the late *W. Broadbill*. The tenant to be at the expense of an agreement for letting; not to sell off hay, straw, turnips, &c. without buying manure with the money arising therefrom. The said *John Illingworth* to satisfy *Mr. Clayton* that he is a person qualified and capable of managing the farm, and in other respects a likely tenant, or this memorandum to become void.”

The Court refused to enforce specific performance of an agreement for a mere tenancy from year to year.

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*Mr. Charles Hall* and *Mr. W. Forster* for the Plaintiff.

*Argument.*

The VICE-CHANCELLOR observed, that the agreement expressed no term during which the tenancy was to continue; and inquired whether there was any authority to shew that this Court would interpose to enforce the specific performance of an agreement for letting from year to year.

*Mr. Charles Hall* said, that a tenancy, commenced from

1853.  
CLAYTON  
v.  
ILLINGWORTH.  
Argument.

year to year, frequently endured by the mutual consent of the parties for a long period; and it was therefore material that its terms should be carefully defined at the commencement. This was provided for by the agreement, which stipulated that the formal instrument should be paid for by the tenant—a stipulation which necessarily implied that such an instrument must be executed by the tenant; and this execution it was the object of the present suit to enforce—a relief which could not be obtained at law.

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*Judgment.*

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The VICE-CHANCELLOR said, that he was not aware it was usual to have a lease under seal in the case of a yearly tenancy; and the reference to an agreement, to be paid for by the tenant, might be explained by the fact, that the present agreement was made with the agent of the lessor, and not with the lessor himself. Equity interposed to compel specific performance in cases where the legal remedy was inadequate; but in this case he did not see why the remedy at law would not be sufficient. An action might be brought upon the agreement, and the full terms of the agreement could be shewn by proving the former agreement with *Broadbill*, to which it referred, thereby importing that agreement into the agreement before the Court. In the absence of any authority for the interference of this Court in such a case, he must dismiss the claim.



1853.

BUTCHART v. DRESSER.

Feb. 24.

THE Plaintiff *Butchart*, and the Defendant *Tempest*, were partners in the business of sharebrokers, at *Huddersfield*, under the name of *Tempest & Butchart*. *Tempest & Butchart*, on the 14th of August, 1844, opened an account with the *Yorkshire Banking Company*; and the account thus opened was drawn upon by the partners, and advances were occasionally made to the firm by the bank beyond the cash in hand, upon the firm depositing with the bank scrip certificates of shares in railways, by way of security for the amount overdrawn. The partnership between *Tempest & Butchart* was dissolved on the 11th of October, 1844, and at that time purchases of a considerable number of shares had been made by *Tempest* on account of the firm; among these were 493 *Leeds* and *Dewsbury* scrip shares, 50 *Churnet Valley* shares, and 30 *Manchester* and *Birmingham* shares. Some of these had been deposited with the bank, as security for advances, before the dissolution of the partnership on the 11th of October, and others of them, which had not been then paid for, were deposited with the bank by *Tempest*, (who was the partner that had attended to this portion of the business of the firm,) after the dissolution, *Tempest* at the same time obtaining money from the bank to enable him to complete the purchases of the shares, which it did not appear could have been done by the firm without such assistance. On the 25th of October, *Tempest*, in the name of the firm, signed an authority addressed to the bank, in the following form:—

*A.* and *B.*, who were partners in the business of sharebrokers, and also bought and sold shares on their own account, dissolved their partnership, and after the dissolution *A.* deposited with the bankers of the firm shares which the firm had contracted to buy but had not paid for, and obtained advances to pay for such shares upon the security created by the deposit, and signed an authority to the bankers, in the name of the firm, to sell the shares, if the monies advanced were not repaid in a certain time. In a suit brought by *B.* against *A.* and the bankers, repudiating the authority of *A.* to make the deposit, obtain the advances, or authorise the sale:—*Held*, that, under the circumstances, *A.* had power, notwithstanding the dissolution, to raise

“We hereby give you authority to sell the *Leeds* and

money for the purpose of completing the purchase of the shares by means of the deposit, and to give the bankers authority to sell the shares in default of repayment.

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 BUTCHART  
 v.  
 DRESSER.  
 —  
*Statement.*

*Dewsbury* scrip deposited in your hands by us, on Thursday or Friday next, if we have not reduced the account in the meantime, say 1000*l.*, or deposited ten *Manchester* and *Birmingham* shares and blank transfer, and paid 500*l.* in reduction. "We are, &c.,

"TEMPEST & BUTCHART."

The Plaintiff *Butchart* had at this time left *Yorkshire*, and was in *Scotland*; and it did not appear that *Tempest* or the bank had any means of communicating with him. The balance of account not having been reduced, the bank, in January, 1845, with the approbation of *Tempest*, caused a considerable number of the shares to be sold, and other sales were made in February, 1845. After giving credit for the proceeds of the shares a balance of about 1700*l.* appeared upon the account to be due from the firm to the bank.

The Plaintiff *Butchart* filed his bill in September, 1846, against the *Yorkshire* Banking Company, by their registered public officer, and two of the directors, from whom discovery was sought, and also against *Tempest*, charging that the bank had notice, on the 11th of October, 1844, of the dissolution of the partnership between the Plaintiff and *Tempest* on that day; and that the subsequent deposit of shares and transactions between the bank and *Tempest* were not authorised, and not binding on the Plaintiff; charging also that the sales of the shares were effected by the bank improperly and at small and inadequate prices; and praying a declaration that the Plaintiff was not bound or affected by the deposit of the shares of the firm, or by any of the dealings and transactions which took place with the bank after the dissolution of the partnership; and that an account might be taken of what was owing by the firm to the bank at the dissolution, and of the value of the shares which had been previously de-

posited; and that the company might be decreed to account with the Plaintiff for a moiety of the value of the shares deposited before the dissolution, after satisfying the balance which should be found to be then owing from the firm; and if the Court should be of opinion that the deposit of shares subsequently was binding, then that the bank might be decreed to account with the Plaintiff for one moiety of the shares in specie, or of the highest price at which they might have been sold since they were deposited; and that the bank might be restrained from proceeding in an action against the Plaintiff for the balance alleged to be owing to the bank from the firm.

1853.  
BUTCHART  
v.  
DRENNER.  
Statement.

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Mr. *Basly* and Mr. *Bagshawe* for the Plaintiff.

Argument.

Mr. *Bacon* and Mr. *Osborn* for the Defendants.

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VICE-CHANCELLOR, after stating the facts of the case:—

Judgment.

I will take it to be the fact, on behalf of the Plaintiff, that the bank had notice of the dissolution on the 11th of October, 1844. I think I should be bound to hold that notice of the dissolution was given on that day to the bank, if it were necessary to decide as to the fact; but I will take it to be so. And, supposing the shares to be then the property of the partnership, of which the Plaintiff and *Tempest* were, upon the dissolution, tenants in common, there would, if the case had rested there, be certainly much ground for contending that *Tempest* alone could not, after the dissolution, have had a right to pledge the shares, or procure any advances of money upon them, or at least upon any thing more than his own share; and it might have been argued, that the advances made by the bank in such a case were made in their own wrong.

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 v.  
 DREAGER.  
 Judgment.

It has also been contended, that the business of the firm was that of sharebrokers, and that obtaining advances of money upon the security of shares was not within the ordinary scope of such a partnership. I will not stop to inquire whether this argument be well founded or not, but I will inquire whether the Plaintiff is in a position to assert the rights which he claims upon this ground. The Plaintiff alleges that the shares are the property of the partnership; but this cannot be the case unless he authorised *Tempest* to buy them for the firm. How can the Plaintiff repudiate the agency of *Tempest* and deny his authority to make the purchase, and at the same time claim the benefit of the purchase which has been made. The shares in question were all contracted for by *Tempest* before the 11th of October. The Plaintiff does not deny, in fact he insists, that the purchases were properly made. The firm had therefore become liable for the purchase-money, and the debt was, from its nature, one which must be immediately paid. The trade was that of buying and selling, and the shares must either be paid for or re-sold. It was not like the case of a purchase of land, or of property to be retained and used by the firm. Each partner must necessarily act in the business of buying and selling, as if he embodied in himself the whole authority of the partnership; and the only alternative in the power of *Tempest* was, to complete the purchase of the shares by paying for them, or by effecting a re-sale. One of these steps he was obliged to take; and he adopted the first, by procuring the bank to advance the monies required, upon the agreement that they should hold the shares by way of security. When the shares came into the hands of the bank they were entitled to a lien upon them for the general balance of their account. When the dissolution had taken place, *Tempest* still had a right to say to the Plaintiff, "these shares have been purchased by the firm; they must be sold, and the accounts of the partnership wound

up." He had a right to say that he would sell the shares; and the Plaintiff could not, by bill in this Court, have restrained him from effecting such a sale. The only distinction between this property and any other is this, that it is not actually in the possession of the partnership; it is not goods in a shop, which there would be no question that either partner could sell. The case may be likened to that of merchants who had ordered goods, which the firm was not in funds to pay for. Suppose it had been cotton, which was on its way from America, and one of the partners had taken the bill of lading to another house, and agreed to deposit the bales of cotton with them, if they would advance a sum of money to meet the payment; I have no doubt that he might have done so, notwithstanding the dissolution. It was admitted, that he might, in such a case, have sold the goods to pay the debt; but then, it was contended, that one partner could not give any authority to other persons for the repayment of the advances they had made, or direct them to do as he might himself have done if the property had remained in the possession of himself and his partner. I cannot see the distinction which is thus sought to be made; nor can I see why *Tempest* could not, in this case, direct the bank to sell the shares which had been deposited. It appears to me, that, in point of principle, the case of *Ault v. Goodrich* (a) goes the whole length of this case. In that case the partnership was between *Wilcox* the elder and *Wilcox* the younger. The partnership was dissolved, and *Wilcox* the elder died before the joint speculation was wound up, and one of the questions in the case was, whether the estate of *Wilcox* the elder was to be answerable in respect of the dealings of *Wilcox* the younger in the joint speculation, after the dissolution of the partnership; and it was held, that the dissolution did not operate to discharge the

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BUTCHART  
&  
DREWES.  
Judgment.

(a) 4 Russ. 430.

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BUTCHART  
v.  
DRESSER.  
—  
*Judgment.*

estate of *Wilcox* the elder from responsibility for the subsequent conduct of *Wilcox* the younger, in respect of the engagements of the partnership with third persons entered into prior to the dissolution. In this case, I think that *Tempest* had authority, after the dissolution, to complete the contracts which the partnership had previously made; and that, in completing these transactions, he necessarily had authority to raise the funds to pay for the shares by their deposit with the bank, and to authorise the bank to reimburse themselves, if necessary, by the sale of the shares.

[His Honour then, after stating that he rested his judgment on the ground above mentioned, proceeded to observe on the evidence of acquiescence by the Plaintiff in the arrangements made by the bank, and held that such acquiescence alone would have precluded any right in the Plaintiff to the special relief sought by the bill. And an account of the dealings of the firm with the bank, and of the balance due to the latter, was directed in the ordinary form.]

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Affirmed by the Lords Justices on appeal.

1853.

## GREEN v. BARROW.

Feb. 14th.

THE testator, by his will, dated in 1792, after giving life interests to his wife and daughter in a sum of 1000*l.*, to be invested in the names of his executors and trustees, *Plowden*, *Day*, and *Green*, declared, that, after the death of the survivor of the wife and daughter, the trusts as to 400*l.*, part of the said 1000*l.*, should be "to pay the said sum of 400*l.* to the said *William Day* and *William Green*;" to which he added, "I give them part and part alike (that is to say), 200*l.* to the said *William Day* and 200*l.* to the said *William Green*, for the trouble they may have in the execution of this my will; but in case of either of their death, I give to the survivor, and in case of both their deaths, to the heirs, executors, and administrators of such survivor, the sum of 200*l.* only." *Plowden*, the other executor and trustee, was the residuary legatee. The testator died in 1800. The three executors proved the will and acted in the trust. *Plowden* died in 1823, *Day* in 1829, and *Green* in 1833. The daughter of the testator, who took a life interest in the 1000*l.*, survived her mother, and died in 1846. The question was, whether the representatives of *William Day* were entitled to the legacy of 200*l.*, or whether it had lapsed by his death after that of the testator but in the life of the tenant for life. The Master had disallowed the claim of the representative of *Day*, and allowed that of the Plaintiff, the representative of *Green*.

In a bequest of 1000*l.* to certain persons for life, and (after their decease) of 400*l.* part thereof to *A.* and *B.*, part and part alike, viz. 200*l.* to *A.* and 200*l.* to *B.*, for the trouble they might have in the execution of the will, "but in case of either of their death," to the survivor, "and in case of both their deaths, to the heirs, executors, and administrators of such survivor 200*l.* only." The words "in case of death" were held to refer to death in the lifetime of the tenant for life of the 1000*l.*

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Mr. *Campbell*, for the representative of *Day*, contended, that there was a distinct gift to him of a legacy of 200*l.* for his trouble as executor; that he had proved the will and performed his part of the trust; and that there were

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 ———  
*Argument.*

no words in the will which clearly and unambiguously revoked the legacy thus originally given.

Mr. *Rolt* and Mr. *Selwyn*, in support of the Master's report, contended, that the legacy to *Day*, who died first of the two executors, failed by his death before the trusts of the will were entirely executed—that is to say, during the lifetime of the tenant for life. The time of death could not be referred in this case to the life of the testator, because the legacy would then be given for a service not performed.

Cases were cited on the following points:—That there was no inflexible rule of construction of the words “in case of death;” but the Court always looked to the nature and circumstances of the bequest: *Cambridge v. Rous* (a), *Brown v. Begg* (b), *Monteith v. Nicholson* (c); and that they might be referred to death in the lifetime of the tenant for life: *Galland v. Leonard* (d), and 2 Jarm. on Wills, 659 et seq.

*Judgment.*  
 ———

VICE-CHANCELLOR:—

If the words of the bequest had stopped at the end of the clause which expresses the first contingency, “in case of either of their death I give to the survivor,” I should have thought that the death referred to must have been death in the lifetime of the testator; and that surviving the testator and proving the will would have entitled each of the executors to his legacy. The rule, which generally refers the words “in case of death” to death in the lifetime of the testator, is certainly not inflexible. When the bequest is immediate and direct, and no life interest is

(a) 8 Ves. 12, 20.

(b) 7 Ves. 279.

(c) 2 Keen, 719.

(d) 1 Swans, 161.



given, there is but one period to which it can be referred, death before the testator; but where there is an intervening life interest, the words may have reference to the time of the termination of that interest, which perhaps is in most cases the more probable intention, for the gift of a legacy generally pre-supposes the survivorship of the legatee. The present case, however, is, that there are two periods, to which the death of the legatee, mentioned by the testator, may possibly be referred. Of these, it is perhaps more likely that a testator would contemplate death in the lifetime of the tenant for life of the fund than death in his own lifetime; but when the occasion of the gift is expressed to be for the trouble the executors may have in executing the will, it becomes just as probable that the testator meant to refer to the possibility of the death happening in his lifetime, so that they could not become his executors, as that he should refer to death at a subsequent period, after the trouble had been undertaken, and whereby, upon that supposition, the executor would be deprived of the intended reward. If the words had been only "in the case of the death of either," I should have considered, as I have said, that death in the lifetime of the testator was the better construction. But the difficulty is on the meaning of the subsequent words, "in case of both their deaths, to the heirs, executors, and administrators of such survivor." The testator must be taken to refer to the same time when he speaks of the death of both, as when he speaks of the death of either; and if the words be referred to death in the lifetime of the testator, the effect will be, that the testator gives a legacy to the representative of the survivor, though that survivor dies in his lifetime; and the reason assigned for the gift, the trouble of executing the will, altogether fails, for no care or trouble could have been taken. This is not likely to have been the testator's meaning. There is certainly, as it has been argued, no strict expression taking away the original gift, unless it be

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 Judgment.

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 ———  
*Judgment.*

read as a gift of 400*l.* upon a certain contingency, and of 200*l.* upon another contingency. I confess I do not feel clear upon the point; but it being necessary to come to some conclusion, upon the whole, I think I must adopt the conclusion to which the Master has arrived.

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Feb. 14th &  
 18*th*.

### BAGUE v. DUMERGUE.

A testator bequeathed so much of his personal estate as when invested in stock would produce 125*l.* a year, to trustees, upon trust to pay the dividends of such stock to A. for life, with a direction that the capital stock should, at A.'s death, fall into the residue of his (the testator's) estate, and a provision, that, if the stock should, before the trusts were fully performed, be paid off or reduced, by which any loss or deficiency might arise, the persons respectively interested therein should bear and sustain such loss or deficiency out of their respective interests, upon their becoming entitled thereto. The dividends on the stock were reduced during the life of A.:—*Held*, that A. was not entitled to have the reduced dividends made up to 125*l.* a year by a sale of a portion of the capital of the stock.

*JOHN ANDRE*, by his will, dated in 1809, directed his wife and executrix, within twelve months after his decease, to invest the principal sum of 5100*l.* sterling, part of his property, in or upon such one of the public stocks or funds as she should think proper, in the joint names of herself and of *Charles Dumergue*, upon trust as to the dividends, interest, and produce thereof, to permit her (his said wife) to receive and take the same for her life, for her separate use; and from and after her decease he directed the said *Charles Dumergue* to stand possessed of the capital of the said stocks, funds, and securities, upon trust, as to so much of the said stocks, funds, and securities, as at the time of investing the said sum of 5100*l.* should, according to the then premium or price of or for the same, have cost or been equivalent to 1000*l.* sterling, part of the said principal trust money, to transfer the same unto *Louis Chaurron Caleas*, provided he should then be living, and have attained or should afterwards attain his age of twenty-one years; but if he should not survive his (the testator's) wife, and also attain twenty-one, then upon trust to transfer the same unto and amongst such of the children of his (*Caleas*) two sisters therein named as should then be living, and should also live to attain the said age;

and upon further trust, as to such further part of the said stocks or funds as at the time and price aforesaid should have cost 500*l.* sterling, to transfer the same unto his (the testator's) shopwoman *Elisabeth Clark*, if she should then be living. The testator proceeded in like manner to dispose of the same sum in case of the death of the last-named legatee, and to bequeath the other parts of the said stock produced by the 5100*l.* in various sums, by similar words of description. He also directed his executrix, within twelve months after his decease, to invest in or upon such one of the public stocks or funds as she might think proper, in the joint names of herself and the said *Dumergue*, so much of his property as by the dividends or interest thereof should be sufficient to raise the sum of 125*l.* per annum, upon trust, after the said investment, to stand possessed of the capital of the said stock or fund, and to receive and take the dividends and interest to and upon the uses and trusts following, viz. as to the said dividends and interests, from time to time to pay the same into the hands of the Plaintiff *Susannah* for her separate use; and upon trust as to the capital stock or fund, upon or in respect of which the dividends should grow or arise, from and after the decease of the Plaintiff *Susannah*, to stand possessed thereof as part of the residue of his estate and effects. And the testator declared, that, if it should happen that the stocks or funds, in or upon which the said trust monies should be invested pursuant to the directions contained in his said will, should, afterwards and before the trusts, ends, intents, and purposes thereinbefore declared as to the same respectively should be fully performed and executed, be paid off or reduced, by which any loss or deficiency might arise, then that the persons respectively who should or might be interested therein, should rateably bear and sustain such loss or any loss or deficiency out of their respective interests aforesaid, upon their becoming entitled thereto,

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Statement.

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 DUMERGUE:  
 Statement.

upon the contingencies thereinbefore expressed and declared. And the testator bequeathed his residuary estate to his wife, whom he appointed his executrix.

The executrix, in pursuance of the direction in the will, transferred into the names of herself and *C. Dumergue* the sum of 3125*l.*, 4*l.* per cent. Annuities, which produced 125*l.* a year; and by her will, dated in 1816, bequeathed the 3125*l.* stock, after the decease of the Plaintiff *Susannah*, to the Defendant *Mary Ann Parish*, and gave her residuary estate and effects to the Plaintiff *Susannah*.

The 4*l.* per cent. stock was in 1824 converted into 3*l.* 10*s.* per cent. Annuities, and in 1844 into 3*l.* 5*s.* per cent. Annuities. The Plaintiff, after the first reduction, received only 109*l.* 7*s.* 6*d.* per annum, and after the second reduction only 101*l.* 11*s.* 3*d.* per annum.

The question raised by motion for decree was, whether the Plaintiff *Susannah* was entitled to the full amount of 125*l.* a year, and to have that sum made up by a sale of a sufficient portion of the capital sum of 3125*l.*, 3*l.* 5*s.* per cent. annuities.

Argument.

Mr. *Rolt* and Mr. *Eddis* for the Plaintiff, argued, that the parties who would become entitled to the stock must, under the provisions of the will, bear the loss occasioned by the reduction, and not the party who was entitled to the dividends only. Most of the decided cases had arisen in the absence of any express provision for the event of a reduction of the stock, and were therefore not applicable.

Mr. *Webb* for the Defendant *Mary Ann Parish*, contended, that each party must, according to the will, bear his own loss, and that the capital was affected by the ne-

cessary reduction of its marketable value consequent on the reduction of the dividends, but not otherwise.—The following cases were cited: *Davies v. Wattier* (a), *May v. Bennett* (b), *Kendall v. Russell* (c), *Commissioners of Charitable Donations &c. v. St. Lawrence* (d).

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v.  
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—  
Argument.

The VICE-CHANCELLOR said, that the question did not depend on any of the authorities with reference to the effect of the reduction of the interest on the public funds upon the interests of legatees, whether of bequests in the form of annuities or otherwise; for the Plaintiff was in this peculiar position—the direction was to invest in the public funds so much of the testator's property as by the dividends or interest would be sufficient to raise 125*l.* a year, and then to stand possessed of it, upon trust to pay the dividends or interest to the Plaintiff, and, subject to this trust, the capital of the fund was directed to fall into the residue, which was given to the widow and executrix. The Plaintiff therefore took the 125*l.* per annum to be produced by the stock, and the widow took the remainder, subject to the life interest. The widow afterwards bequeathed the stock as a specific legacy to the Defendant, and her residuary estate to the Plaintiff, who therefore now represented the residue originally vested in the widow of the testator. The right for which the Plaintiff contended was not supported either by the class of cases in which bequests arising from stock have been held to be in the nature of annuities entitling the legatees to have the income made good out of the residue by the purchase of a larger sum of stock, or by the class of cases in which the legatee had been held to take no more than the dividends of the stock, whatever they might be. If the Plain-

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(a) 1 S. & S. 463.

(c) 3 Sim. 424.

(b) 1 Russ. 370.

(d) 3 J. & L. 561.

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—  
*Judgment.*

tiff were entitled to the relief sought by the motion, it must be under the peculiar phraseology of this will, in which provision is made for the event of the paying off or reduction of the stock. [His Honour stated the terms of the will, as to the 5100*l.*, and as to the stock which was to produce the 125*l.* a year; and the direction that the legatees should respectively bear the loss or deficiency out of their respective interests upon their becoming entitled thereto.] There was a difficulty in attributing a distinct meaning to all the words of the will. The contest on the part of the Plaintiff was, that, if any loss or deficiency should occur in the dividends or interest by the payment or reduction of the stock, when the parties became entitled to it, the capital of the stock ought to be applied to make good the loss of the dividends. He should have great difficulty in arriving at the conclusion, upon the form of the provision in the will, that it was intended that the tenant for life of the dividends should bear no loss, and that the other parties interested in the stock should bear the loss which the reduction had occasioned to the tenant for life. The testator had allotted the sum of 5100*l.*, directing that each of his legatees should take so much stock as was purchased by the particular sums, part of the aggregate sum, to which he refers. His mind was apparently directed towards the sums of stock in a mass, and he declared that the persons respectively who should or might be interested therein, should rateably bear and sustain the loss or deficiency. The loss or deficiency might be in the reduction of the dividend, or in the reduction of the value of the stock, or it might be in both. He was of opinion, that could not be a "rateable" distribution of the loss between the tenant for life and the parties in remainder, which would throw the whole loss upon the party entitled to the stock in remainder, and wholly release the tenant for life from it, which it was sought by this motion to do. The motion must therefore be refused.

1853.

FLAVEL v. HARRISON.

Feb. 22nd.

**FLAVEL** the elder invented a stove or kitchen-range, which was alleged to possess peculiar advantages, and which he described as "*Flavel's Patent Kitchener*," although, in fact, no patent for the invention had ever been obtained. The Plaintiff, *Flavel* the younger, succeeded to the business and benefit of the invention, and made and sold the article in question by the same name. The kitchen-range was exhibited by the Plaintiff at the Exhibition of 1851, amongst the articles of ironmongery; his attendant on that occasion being directed to inform all persons making inquiries on the subject, that the invention was protected by a patent.

The Court refused to grant an injunction at the suit of *Flavel*, to restrain *Harrison* from making and selling a stove by the name of "*Flavel's*" Patent Kitchener, on the ground, first, that *Flavel* had falsely assumed to describe the article as being patented; and, secondly, that he had known of the use of the name by *Harrison* four months before he applied for the injunction. But the Court, not deciding the question whether *Flavel* had or had not a legal remedy, retained the bill, giving him liberty to bring an action.

The Defendant *Harrison* entered into the service of the Plaintiff in 1850, and, as it appeared, during the time he was in such service, took plans and drawings of the models and manufactured articles belonging to the Plaintiff, and lists of the names of his customers, and in some cases applied for orders on his own account, using in such applications letter-paper and envelopes bearing the name and address of the Plaintiff. The Plaintiff, having discovered these proceedings of the Defendant, discharged him from his service; and soon after such discharge, in the month of October, 1852, the Defendant issued placards advertising as his own manufacture articles which he described as "*Flavel's Patent Kitcheners*," at reduced rates, and which stated to be "warranted the same as the articles in the Great Exhibition, 1851."

The Plaintiff now moved for an injunction to restrain the Defendant from describing or selling the articles of his (the Defendant's) manufacture by the name of "*Fla-*

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*vel's*" Patent Kitchener, or as being of the manufacture of the Plaintiff.

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Mr. *Swanston* and Mr. *Tripp* for the Plaintiff, in support of the motion, cited cases in which the Court had interfered to restrain the use, for the purpose of profit (or otherwise), to the prejudice or against the will of the owner, of the materials or information acquired in a situation of confidence, in which the party had been placed by such owner: as Recipes or compounds, *Yovatt v. Winyard* (a), *Morison v. Moat* (b); Merchants' accounts, *Tipping v. Clarke* (c); Drawings or etchings, *Prince Albert v. Strange* (d); and other cases, in which the Court had restrained one tradesman from using the distinguishing names or marks adopted by another: as Stamps on metal, *Mellington v. Fox* (e); Names on public conveyances, *Knott v. Morgan* (f); and authorities shewing, that evidence of such use would even sustain an action on the case: *Sykes v. Sykes* (g); and that even the circumstance that the party whose act was complained of as the invasion of the right of another, was in truth using his own name, was not regarded as an excuse: *Croft v. Day* (h), *Rodgers v. Nowill* (i).

Mr. *Rolt* and Mr. *Selwyn*, for the Defendant, contended, that, to grant the injunction, would be to give to the Plaintiff all the advantage of a patent, without a patent. The article was free to all the world. It had a certain name, which all the world might use. Names of articles become by force of accident or habit incorporated in the names of

(a) 1 J. &amp; W. 394.

(b) 9 Hare, 241.

(c) 2 Hare, 383, 393.

(d) 1 H. &amp; T. 1.

(e) 3 My. &amp; Cr. 338.

(f) 2 Keen, 213.

(g) 3 B. &amp; C. 541.

(h) 7 Beav. 84.

(i) 6 Hare, 325.



things, and it would be contrary to common sense and rational policy, that one person by adopting a particular name should acquire for ever an exclusive right to use it. The name of "*Wellington*" and "*Waterloo*" were a few years ago applied to multitudes of articles; but it has never been attempted to monopolise the exclusive use of these words in connection with any of the articles with the names of which they were compounded. Names so attributed often become the sole mode of distinguishing the article, as "*Morrison's Pills*," "*Hansom's Cab*," "*Godfrey's Cordial*," "*Arnot's Stove*." Sir *Thomas Plumer*, in the case of an application to restrain the sale of "*Vellos' Vegetable Syrup*," said, "if this claim of monopoly can be maintained without any limitation of time, it is a much better right than that of a patentee (a)." It must also be shewn, that the assumption of the name of another party was prejudicial, not in character but in profit, or otherwise the Court would be assuming a criminal jurisdiction: *Clark v. Freeman* (b). And there were also other conclusive objections to the right of the Plaintiff to relief by this motion, arising from his own conduct, even if he were otherwise entitled to it on principle. The Plaintiff had misdescribed the article. He had deluded the public, and averted competition by gratuitously describing it as a "*Patent Kitchen*," when there had never, in fact, been any patent: *Pidding v. How* (c), *Perry v. Truefitt* (d), and he had precluded himself from any title to the remedy by injunction, by his delay for a period of four months after he knew of the subject of complaint, before he made his application.

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Argument.

(a) *Canham v. Jones*, 2 V. & B. 231.

(b) 11 Beav. 112.

(c) 8 Sim. 477.

(d) 6 Beav. 66.

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—  
FLAVEL  
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HARRISON.  
—  
*Judgment.*

VICE-CHANCELLOR:—

The Defendant in this case contends, that, inasmuch as the manufacture and sale of the article in question, "*Flavel's Patent Kitchener*," is not exclusively reserved by any patent, he has a right to make and sell it; and that, from this right to make and sell, it follows that he has a right to affix to the article the name by which it is known.

I am very far from assenting to such a proposition in that unqualified form. I can well understand, that an inventor or manufacturer might in that way be greatly damaged by the bad imitations of his works by unskilful persons. The whole value of his property in the right to make an article, to which his ingenuity and industry might have given a value and public appreciation, might be destroyed by the acts of ignorant imitators. That would trench very strongly upon the right which parties may acquire to protection against the fraudulent use by others of their fixed trade marks and labels, although this is not the case of a mark or label upon the goods, but is the case of a name given to the entire article, and which is also the name of the inventor.

I must also observe, that there are many parts of the conduct of the Defendant in this matter which it is impossible to view without great disapprobation. It is impossible to justify the manner in which he obtains a list of the Plaintiff's customers, makes plans and drawings of his works, and solicits the custom of those who are dealing with his employer. The use of letter-paper and stamped wafers, having the Plaintiff's marks, by the Defendant while actually in the employment of the Plaintiff, was most unwarrantable, and was calculated to produce the impression that he was connected with the Plaintiff in some way, which enabled him to supply these articles better

than the rest of the world. If he afterwards intended to act fairly, it would have been easy to say that he was manufacturing an article of the same excellence as that of the Plaintiff, and cheaper, or to have otherwise described his ranges so as to avoid anything which could mislead. He would not have headed his placards "*Flavel's Patent Kitchener*," nor would he have referred to the Great Exhibition, nor added the words "*Warranted Flavel's Patent Range*." Such representations are plainly calculated to induce the public to presume that he was offering for sale the very article of which the Plaintiff was a manufacturer, and that his sales were in fact authorised by the Plaintiff. I cannot allow this conduct of the Defendant to pass without expressing my disapprobation of it.

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*v.*  
*HARRISON.*  
*Judgment.*

I cannot, on the other hand, go to the extent of the proposition which has been put forward in some of the arguments for the Plaintiff,—that in no case may a workman make use of the knowledge which he acquires in his employment for the purpose of his trade. Such a principle would go too far. It would prevent an apprentice from availing himself of the knowledge and experience which he acquires during his apprenticeship. One of the beneficial tendencies and results of labour is, to gain for the intelligent and industrious workman the skill and power of exercising his trade with progressive increase of utility to the public and profit to himself, as his experience becomes more extensive; and certainly there can be no principle of law which restrains a workman from making a fair and legitimate use of his experience.

I come now to the two particular circumstances upon which I shall decide this case. The Plaintiff relies upon the title which he has acquired to this particular manufacture, and to the name by which it is known, that name being, as he states, "*Flavel's Patent Kitchener*." Now,

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*Judgment.*

it turns out that neither the Plaintiff nor his father, the original inventor, ever had any patent in the article, and that it never was in fact a patented article. This brings the case within the doctrine of *Perry v. Truefitt* (a), and *Pidding v. How* (b). The Plaintiff, by using this appellation, certainly misleads the public; although the extent to which any particular individual may be deceived may depend on a variety of circumstances. Every one knows that patented articles are in proportion more expensive than articles which are open to the competition of the world; and purchasers are more readily inclined to give a higher price for an article protected by patent than if it were open to unrestricted competition. It was said, that, in *Pidding v. How* (b), there was a fraud upon the public, because the majority of purchasers could not know whether there was any such person as *Howqua*, and, therefore, might be led into purchasing the tea mixture upon a recommendation the truth of which they could not test, whilst in this case they might ascertain for themselves whether there was a patent or not, and they might test the merit of the invention. I think, however, that the use of the word "patent" operates to prevent the public from testing it as they otherwise might; they are dissuaded from examining the article, with a view to imitation; and it is in evidence that persons were prevented from making that free use of it which every purchaser has a right to make of an unpatented article. The knowledge that there was no patent would enable and encourage every ironmonger who bought the article, to take it to pieces, and examine, and make copies and models of all the parts for the purpose of imitation, if he thought it likely to be useful, which he would never think of doing with regard to a patented article. There was a case before Lord *Eldon*, in which a patent had been taken out, and had never been

(a) 6 Beav. 66.

(b) 8 Sim. 477.

repealed, although an action had been brought, and decided against the patentee. In that case, the description had been originally true, and had never been finally decided to be wrong; and Lord *Eldon* thought the use of the description did not deprive the party of his right to protection. Here the Plaintiff comes with a description for which there never was any foundation,—which is, in fact, a direct misrepresentation; and he asks this Court to protect him in continuing to use it. On this ground, I think I ought to retain the bill, as in *Perry v. Truefitt*; for, although I think it is not a case in which the Court should interfere by injunction in the first instance, I cannot say that a Court of law might not consider the Plaintiff entitled to a remedy for the wrong done by the Defendant in the use of his name; and if he should prove to have a legal right, he would then be entitled to the aid of this Court to enforce it.

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 v.  
 HARRISON.  
 Judgment.

I now come to a second ground for refusing the injunction. It appears that the Defendant, in the first place, issued advertisements, which certainly did not imply any intention of selling these articles as of the Plaintiff's manufacture. From these first advertisements it might have been inferred that the Defendant was about to bring out (what I think he ought to have brought out, if anything,) a "*Harrison's* Kitchener," in competition with *Flavel's* Patent Kitchener." The Plaintiff thereupon advertised that the Defendant had been discharged from his service. This was followed by another advertisement from the Defendant, in which he did not say that he was going to use the Plaintiff's name, but, that he was about to sell the article known as "*Flavel's* Patent Kitchener" at a certain price. His next step was to issue placards, advertising, not articles similar to the Plaintiff's, but articles "*warranted Flavel's* Patent Kitchener." That was in October last; and it was then that the Plaintiff had a case for the

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FLAVEL  
v.  
HARRISON.  
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*Judgment.*

interference of the Court to restrain this use of his name. The Plaintiff, however, says, that he never had any ground for knowing or supposing that the Defendant actually sold these articles as being of his (the Plaintiff's) manufacture, until January last, when the two persons whom he has called as witnesses, went to the Defendant. These witnesses state that the Defendant sold them an article as being of the Plaintiff's make, and said that he had as much right to use the name as the Plaintiff himself. The Defendant, however, explains that what he really said was, in effect, nothing more than appears in the placard, that he warranted the articles to be exactly similar to those known as "*Flavel's Patent Kitchener.*" He denies that he ever stated them to be actually of *Flavel's* own manufacture. The difference in the words represented to be used is not great, and the Defendant's construction of the effect of the representation is borne out by other witnesses, who agree in stating that he never alleged the kitchen range, which he called *Flavel's*, to be really made by any other person than himself. I am bound to say, that it is not shewn to my satisfaction, that the Defendant did in January last, or at all, represent the articles sold by him as having been made by the Plaintiff; and it is clear, as to the use of the name of "*Flavel,*" that it was known to the Plaintiff, or, if he had chosen to attend to that to which his attention was sufficiently called, it might have been known to him as long ago as October last. I shall therefore direct the motion to stand over for six months, with liberty to bring an action.

1853.

## TAYLOR v. TAYLOR.

Feb. 16th.

THE testator *J. J. Taylor*, a jeweller and cutler in *Oxford-street*, by his will, dated in January, 1850, after giving certain pecuniary legacies, gave all his furniture, plate, linen, china, books, prints, pictures, wines, liquors, and other household effects used by him in his dwelling-house, of which he should die possessed, to the Plaintiff absolutely; and he bequeathed the goodwill of the business then carried on by him at Nos. 161 and 161a, *Oxford-street*, the lease under which he held the same premises, and all his stock in trade therein, together with all book debts owing to him (subject, nevertheless, to any trade debts) to the Plaintiff his wife, upon trust to carry on the said business until his son *Sydney James Taylor* should attain the age of twenty-one years, and to receive and take the net gains and profits thereof for her own use and benefit. And, upon his said son attaining that age, then as to one-third part of the said stock in trade, goodwill, lease, and book debts, he, the said testator, gave and bequeathed the same to the Plaintiff for her own use and benefit absolutely; but, in case his said son should not live to attain the age of twenty-one years, then, from and immediately after his decease under that age, he gave the whole of his stock in trade, together with the goodwill, lease, and debts, to the Plaintiff, for her own use and benefit absolutely. And the testator gave, devised, and bequeathed his real estate, and his residuary personal

After the testator, who was a shopkeeper, had made a will, bequeathing his leasehold house and shop and the stock in trade therein to his wife (subject to certain trusts, which failed), and giving his residuary estate in another manner, he became insane. No commission of lunacy was taken out, but, his wife not being disposed or competent to carry on the trade, joined with the persons whom he had named executors, and also with the residuary legatees, in an agreement for the sale of the leasehold premises and stock in trade therein for a gross sum, to be paid by instalments. After this agreement was made, and possession of the property delivered to the purchaser, the

testator died. The Court, in an administration suit, approved of the agreement as beneficial to the estate, and directed it to be carried into effect:—*Held*, that, notwithstanding the agreement for sale, and the transfer of the possession of the property specifically bequeathed, none of the parties having any lawful authority to effect such a sale, both the leasehold estate and the stock in trade must be taken as unconverted at the death of the testator, and passed to the specific legatees.

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estate, upon certain trusts, for the benefit of the Plaintiff for life, and, at her death, for the said *Sydney James Taylor* absolutely, in case he should attain the age of twenty-one years; but, in the event of his decease under that age, then in trust for the Defendant *Sarah Jones Helfrich* for her life, and, after her death, to such persons as she should by will appoint.

*Sydney James Taylor* the son died in February, 1850, an infant; and soon after his death the testator became of unsound mind, and in April, 1850, he was removed to a lunatic asylum. It being improbable that he would ever again be capable of managing his affairs, it was agreed between the Plaintiff his wife, *Taylor*, and *Morris*, who had with her been named executors in the testator's will, and *Sarah Jones Helfrich*, one of the residuary legatees named in the same will, and her husband, that the testator's stock in trade and goodwill of the cutlery business, carried on at No. 161a, *Oxford-street*, and the lease of the same premises, should be sold to *Samuel Reid*, an assistant to the testator, who should also be released from a covenant he was under not to carry on the same business within a certain distance of the testator's shop; and *Reid* agreed to purchase the stock in trade for 1312*l.* 14*s.* 11*d.*, and the lease, fixtures, and goodwill of No. 161a, at 300*l.*, making 1612*l.* 14*s.* 11*d.* It was agreed between the parties, that payment should be made by *Reid* by several promissory notes and bills of exchange, payable at different dates, the notes being made payable and the bills being indorsed to the testator. By a deed, dated the 22nd of June, 1850, made between all the parties to the foregoing agreement, it was declared, that the amounts for which the notes and bills were given should, when paid, be invested in Consols, in trust as to 300*l.* for the security of *Reid*, that the agreement should be performed; and as



to the whole fund, subject to that security, upon trust for the testator absolutely. *Reid* was placed in possession of the premises and stock in pursuance of the agreement, and sold a considerable portion of it in the course of his trade. The testator died in August, 1850, without having again become of sound mind. The Plaintiff his widow, and *Taylor* and *Morris* the Defendants, proved his will. The circumstances of the agreement and sale were referred to the Master, who found that it was proper they should be carried into effect. The bills and notes given by *Reid* were at this time in the hands of the executors, and had not been paid.

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Mr. *Bacon* and Mr. *Dart*, for the Plaintiff, claimed to be entitled to the securities for the purchase-money of the stock in trade, lease, and goodwill, agreed to be sold to *Reid*, as she would have been entitled under the will to those articles as specific legatee if the sale had not taken place.

Argument.

Mr. *Elderton* and Mr. *W. Forster* contended, that the sale had been, in fact, a conversion of the specific articles into money, and that as money it passed under the residuary bequest: *Browne v. Groombridge* (a). The dealing with the property in this case was no more than what any prudent owner would have done; and the act of conversion having been approved and confirmed by the Court, the specific legacy was adeemed, and the Court would not recall it: *Bromfield, Ex parte* (b), *Wheldale v. Partridge* (c). There was no equity as between legatees entitling one to the assistance of the Court against the other; they must take the property in the state in which it actually fell to them: *Lushington v. Sewell* (d), *Welby v. Rockcliffe* (e). In

(a) 4 Madd. 495.

(d) 1 Russ. & My. 169.

(b) 1 Ves. jun. 453.

(e) Id. 571.

(c) 5 Ves. 396.

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what state the property ought to have come to the legatees was, therefore, an immaterial question.

Mr. Teed, Mr. Campbell, Mr. Hetherington, and Mr. Cracknell, appeared for the executors, and Reid the purchaser of the property to which the question related.

*Judgment.*  
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VICE-CHANCELLOR:—

I am certainly somewhat surprised at finding the extent to which the Court went in *Browne v. Groombridge* (a); but it would be carrying the principle much farther, to hold that an act of this description had the effect of so altering the property as to make a large part of that which the testator had given to his wife, the property of other legatees at the time of his death. I think it is impossible to say, that, in consequence of the acts of parties, which might indeed have been beneficial in their result, but were wholly without authority, and were in fact in no sense completely effected at the testator's death, the property of the testator must be treated as so changed in its character as to affect the respective interests of his legatees. The decision in the case of *Browne v. Groombridge* was founded on two grounds:—the testator had made a specific bequest, under which he intended to pass only the cash in his house or about his person; and after he became insane, large sums of money were received, which his wife directed to be laid out in the funds, and the investment of the money was considered to be no more than what a prudent owner would have done. I am here, however, asked to do a great deal more. The property which was attempted to be sold in this case was a leasehold house, and a large stock in trade. In order to test the point more distinctly, I will suppose it to have been real estate belonging to the testator, and that

(a) 4 Madd. 495.

the legal interest was outstanding in trustees, and the parties acting for the lunatic intending to sue out a commission take upon themselves to sell the estate, and make such title as they can,—the purchaser taking his chance of the confirmation of the transaction. It would be a strong thing to say, that a transaction of this kind could be treated as having the effect of converting the estate into money. Take, again, another case, suppose a trustee of a sum of stock for a party who has become insane should be of opinion that the lunatic is in want of the fund for his maintenance, and should take upon himself to sell the stock. It may be, that, so far as the proceeds of the stock have been properly applied for the benefit of the lunatic, the Court might hold that the parties interested in the stock had no remedy against the trustees in respect of the sale; but it does not follow that the proceeds of the stock, which remained unapplied, would cease to be regarded as stock, and be treated as if it had always consisted of money.

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The point which is in this case most favourable to the argument of those who contend for the complete effect of the conversion, is that which relates to the stock in trade. If the stock in trade had stood alone, the case would have come much nearer to that of *Broune v. Groombridge*, for the stock in trade consists of property which in its nature required to be dealt with. No one can entertain a doubt that it was right that this property should be disposed of, the lady being incapable herself of carrying on the business. In strictness, however, the proper course would have been to have taken out a commission of lunacy, but that was not done; and not being done, there was no person in a position to do any act which could confer a lawful title to any portion of the property, except the title which would be given by the sale of articles to the customers, which passed by delivery in the ordinary course

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of trade. Sales effected in that manner are not analogous to the proceeding which was taken, and, perhaps, very properly in this case. I think the finding of the Master is right,—that this agreement is proper and should be carried into effect; but it was not an agreement which at the time of the testator's death was binding on his property, and therefore, there being no equity between legatees, the legatees must take it, according to the trust declared by the will, in its converted state. I found my decision on this,—that at the time of the testator's death this portion of his estate consisted in fact, not of money, but of the leasehold premises and stock in trade, which passed by that description to his specific legatees.

*Feb. 21st.*

GIRDLESTONE v. CREED.

Sums invested by the testatrix in stock, and other sums placed by her in the savings bank, were the produce of monies which had been partly collected and partly appropriated by the testatrix for the purpose of building and endowing a church in a certain parish. The stock had been invested in the names of the testatrix and of another

person. At the time of the decease of the testatrix no deed appointing or declaring the trusts of the money had been executed, and no site for the intended church had been obtained:—*Held*, that the money and stock were, at the death of the testatrix, part of her personal estate, and that the liability either of the money or the stock to any charitable use was excluded by the stat. 9 Geo. 2, c. 36.

Exception to stat. 9 Geo. 2, c. 36, in the case of a bequest of monies to the extent of 500*l.* for building or endowing a church.

*ALGERINA BELL*, the testatrix, was the daughter of a deceased vicar of *Stow Bardolph*, in *Norfolk*, and had collected subscriptions for the purpose of building and endowing a church or chapel-of-ease in that parish. The sums so collected she deposited from time to time in the *Lynn Savings Bank*, to an account intituled "*The Stow Provident Society, Algerina Bell Treasurer*," there being in fact no such society, and the name being assumed, in order to admit of the deposit of a larger sum than would be received from a private person. Sums were drawn out of this account, and paid to the private bankers of the testatrix, and invested in Consols in the joint names of herself and *Henry Girdlestone*. At the time of her death

a sum of 355*l.* 5*s.* 11*d.* stood in the savings bank to the said account, and 1096*l.* 1*s.* 3*d.* in Consols, which had been transferred into the said names more than six months before the death of the testatrix. In the first page of the first pass book kept by the testatrix with the savings bank, there was a note in pencil in these words (whether or not written by her was not proved):—"This society is saving small sums towards erecting an Episcopal Chapel, at *Stow* Bridge for the poor, who amount to nearly 600, and live two to four miles distant from *Stow* Church." The following memoranda were found on a paper in the handwriting of the testatrix:—

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"S. B. C.

"Definite promises.—A. B. 50*l.*, Miss *Brinton* 50*l.*, *Norwich* Diocesan Society 50*l.*, Rev. *George Dashwood* 20*l.*, Rev. *Gale Townley* 10*l.*, Hon. and Rev. Lord *Poyning* 5*l.*, Rev. *Jermyn Pratt* 5*l.*, Rev. *Robert Long* 5*l.*, Anonymous 5*l.*, in the Savings Bank 295*l.* Total 495*l.*: this is the building fund. In the 3*l.* per cent. Consols 1000*l.*: this is the endowment fund" (a).

The testatrix had, in a correspondence with the Bishop of *Norwich* with regard to the right of presentation to the projected church or chapel-of-ease, mentioned her intention of building and endowing it; and she had advised with a solicitor on the subject, and directed him to prepare the draft of a declaration of trust of the monies which had been provided. The draft had been prepared, but had not been seen by the testatrix; and no declaration of trust was ever executed. The land for the site of the intended building had not been procured.

(a) This document was not dated; but, from the state of the account to which it alludes, it was inferred that it was written in May, 1845.

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The testatrix appointed *Henry Girdlestone* and another her executors; and several questions arising with respect to her estate, and, among others, a question with regard to the disposition of the investments in Consols and the savings bank above referred to, the executors instituted the suit for the administration of the estate (*a*).

The Master, by his report, found that the 1093*l.* 1*s.* 3*d.* Consols, and 355*l.* 5*s.* 11*d.* cash, did not form part of the assets of the testatrix; but that the 1093*l.* 1*s.* 3*d.* Consols were subject to a trust for endowing a church or chapel-of-ease at or near *Stow* Bridge, and the sum of 355*l.* 5*s.* 11*d.* was subject to a trust for erecting such church or chapel-of-ease. The residuary legatee claimed these funds as part of the estate, and excepted to the report.

*Argument.*  
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Mr. *Rolt* and Mr. *Selwyn*, for the exceptions, relied on the stat. 9 Geo. 2, c. 36, which provides, that no "sum or sums of money, goods, chattels, stock in the public funds, securities for money, or any other personal estate whatsoever, to be laid out and disposed of in the purchase of any lands, &c., shall be given, granted, &c., in trust or for the benefit of any charitable uses whatsoever, unless such gift, &c., be made by deed inrolled as therein mentioned, and unless such stocks be transferred in the public books six calendar months, at least, before the death of such donor, &c., and unless the same be made to take effect in possession." Whatever may have been the intention of the testatrix in collecting the subscriptions of which this fund was composed, or the design which she entertained with regard to the aggregate fund when it was collected, and whatever the right or remedy of the subscribers may be to recover their money from the estate of the testatrix, on

(*a*) See *Girdlestone v. Creed*, 8 Hare, 208.

the ground that she has not applied it according to their direction or intention, the Attorney-General has no right to insist upon the application of the fund for charitable purposes. Mere proof of the purpose for which the various subscribers gave their money is insufficient to supply the want of that form of dedication to a charitable use which the statute requires: *Attorney-General v. Gardner* (a).—They cited also *Attorney-General v. Hinzman* (b), *Attorney-General v. Davies* (c).

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Mr. Wickens, for the Attorney-General, in support of the report.—The trustees of the fund do not insist upon any objection arising from the statute, and it is not competent for any other persons to compel them to do so *Attorney-General v. Ward* (d). There was sufficient evidence of the intention of the testatrix to enable the Court to ascertain and carry it out: *Giblett v. Hobson* (e).

VICE-CHANCELLOR:—

It is probable that this testatrix would have been greatly shocked if she had been made aware of the consequences of the state in which this property was left at her decease. I have, however, but to consider what these consequences actually are in point of law. The case may be considered in two ways:—First, supposing the fund in question to be composed entirely of the proper money of the testatrix; and, secondly, supposing it to be made up of the money of other persons. Now, taking the money to be wholly her own, I will consider first the claims upon the sum in the savings bank. If this sum had been the money of the testatrix, nothing that she had done at the time of her death could operate under the statute as affecting that

Judgment.

(a) 2 De G. & S. 102.  
(b) 2 J. & W. 370.  
(c) 9 Ves. 535.

(d) 6 Hare, 477.  
(e) 3 My. & K. 517.

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money with any charitable trust. It would be only money which the testatrix had intended to apply to a charitable use, but which she had not impressed with that use in the manner which the statute requires, namely, by deed duly executed twelve months and enrolled six months before her death. The mere evidence of her intention, therefore, however plain, cannot satisfy the provisions of the statute. I will now suppose the whole of the fund in question to be in the public funds, bought by the testatrix with her own stock money. In that case the provision of the Act which requires a deed executed and enrolled does not apply; but still there must be some declaration of trust. It is impossible to say that a mere transfer of this stock, without more, could vest it to the charitable use which the testatrix had in view, for there would be no evidence in support of the charity. I will not say that it may not be open to argument, that where the transfer of the stock has been duly made for the period limited by the statute, a parol declaration of trust might in some cases be sufficient, although perhaps that can hardly be the construction of the Act. It is, however, clear, that there must be some declaration of trust, for the transfer cannot alone have that effect. The question then is, what intention the testatrix has manifested in this case. The only indications of that intention which we have, are, that it was designed for the endowment of a church. I will suppose this intention to be clearly ascertained, and it is then necessary, in order that effect may be given to the intention by means of the transfer of the stock, that the gift so effected may be "made to take effect in possession for the charitable use intended immediately from the making" of the transfer. If this be not done, the intended charitable object cannot avail itself of the benefit of the fund. But in this case, to what particular charity is this fund devoted? There was an intention to build a church, but there was no existing church, which could take or claim the gift. It is impossible, therefore,



that the conditions of the gift imposed by the statute can be fulfilled in this case. It may be contended, from the manner in which this money was first paid into the savings bank, and then transferred to the bankers and invested in stock, that it was a sum the whole of which the testatrix had dedicated to charity; but it cannot be said, that it was appropriated to any existing charity. Until the church, which the testatrix contemplated, should be built or be in existence, the stock must be subject to a resulting trust for the lady. If the testatrix had declared, in the most formal manner, that the stock was transferred for the endowment of a non-existing church, I do not see how it could satisfy the words of the statute by immediately taking effect in possession. It could not, I apprehend, be what the statute requires, which I may call an 'out and out' gift to the charity, over which the testatrix retained no power of disposition. This is the way in which it appears to me that the case would stand, if the stock had been wholly the produce of the testatrix's own money.

I will now assume that the monies in question belonged not to the testatrix, but were the monies of other persons, collected by the testatrix for the purpose intimated in the memoranda of the testatrix, which are in evidence. The result to which we must arrive no doubt hurts one's moral sense, but it is the necessary consequence of the statute. The lady has been collecting a considerable sum of money for this intended church; she has it all paid into her own bankers, for the money in the savings bank must be regarded as in her own hands, as well as the money in the bank of Messrs. *Gurney*. There was no provident society corresponding with the title of her account, and no person other than herself could in fact interfere with the account. The money being then standing in effect to the account of the testatrix, her death takes place before any

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charitable use is fixed upon it. The consequence is, that there is a resulting use for the persons to whom the money belongs. The original purpose of the contribution was lawful. The object which the parties had in view might have been effected without contravening any principle of law or public policy; and if for any cause the contributors failed in their purpose, they might legally recover back the monies they had paid. It could not be said that the fund was impressed with any use entitling the Attorney-General to take hold of the sum and insist upon its application to charity. The testatrix has taken the money of strangers for a particular purpose, and paid it into her bankers. Whatever inconvenience or difficulty there may be in the remedy for these small sums, yet there is no doubt that she has incurred a debt to each of these subscribers, the amount of which they may recover by the ordinary proceedings against her estate. If a person receive money upon a certain trust, he becomes accountable as a trustee; and if he has paid it into his bankers, and the trust fails, no one would think of saying that the money in the hands of his bankers is not his own money. He alone has a right to deal with it, and the circumstance, that it has been made up by contributions from other persons does not entitle the Attorney-General or any stranger to intervene and say 'this specific fund must be taken and applied in a particular way in consequence of the trust, or promise, or undertaking upon which it was received.'

If the fund be regarded as consisting of stock in which the amount of these subscriptions has been vested by the testatrix, a different view of the subject may be taken, but the result is substantially the same. It does not follow from what took place that the Attorney-General would ever have acquired any interest in the money; and he is not, therefore, in a position to insist that the testatrix has so dealt with money belonging to a charity, or

has so mixed it with her own monies, that the whole mixed fund must be regarded as belonging to the charity. However unfortunate the consequence may be, I am bound to hold that these funds, both the money in the savings bank and the stock, remained the property of this lady at the time of her death, and must be treated as part of her estate. The execption must, therefore, be allowed.

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The will of the testatrix contained this clause:—"And I direct that the property which I have received by the demise of Mrs. Browne, of Gorleston, shall be divided into three equal portions, two parts to be divided among the children of Mrs. Allen, and the other part to the said Mrs. Creed for life, and at her death to be divided among her children."

A considerable portion of the estate to which the testatrix became entitled as next of kin of Catherine Astley on the decease of Lucy Browne (a), had not been paid to the testatrix at the time of her death, but was afterwards received by her executors.

A bequest of "the property which the testatrix had received by the death of B."—Held to pass not only the property which the testatrix actually received in her lifetime from the source referred to, but also property to which the testatrix was then entitled in possession, but which was not actually paid until after her decease, and was then received by her representatives.

Mr. Rolt and Mr. Selwyn, for the residuary legatee, contended that the words of the bequest, "the property which I have received," amounted to a gift of no more than the sum which had actually been paid to the testatrix at the date of her will; or, taking the will to speak from the time of her death, then, at the utmost, to no more than a gift of what was received by the testatrix during her lifetime; and that the monies paid to her executors after her decease by the administrator of Lucy Browne formed part of the residue.—They relied upon the canon of construction, that all words must

(a) See *Say v. Creed*, 5 Hare, 580.

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be taken in their strict primary meaning, and that the secondary and less accurate interpretation could not be resorted to unless the primary sense was inapplicable.

Mr. *Elmoley* and Mr. *Eddis* for the specific legatee.

Mr. *Follett* and Mr. *Fleming* for the Plaintiff.

*Judgment.*

The VICE-CHANCELLOR said, that, if there had been any substantial distinction in the nature of the property derived from the estate of Mrs. *Browne*, as if the testatrix had, as to a portion of it, taken an interest in possession, and as to another portion an interest in reversion, there might have been ground for the argument, that only so much as the testatrix had become possessed of would pass to her legatees; but there was no such distinction in this case. The question was not one of the primary or secondary sense of words, but it was simply what the testatrix meant by the description she had given of the property she had received by the decease of Mrs. *Browne*. He thought the meaning was 'the property she had acquired by that event,' and no distinction could be properly made between monies which had actually been paid to her, and monies which then equally belonged to her, but the payment of which, from the delay occasioned by the suit or any other cause, had been accidentally deferred, and afterwards was made to her representatives.

Mr. *Wickens*, for the Attorney-General, claimed the benefit of the residuary bequest, for building and endowing a church at *Stow Bridge* (a), to the extent of 500*l.*, a charitable use of that nature being to that extent ex-

(a) See 8 Hare, 208.

cepted from the operation of the statute 9 Geo. 2, c. 36, by the subsequent statute 43 Geo. 3, c. 108.

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DIRECT a sum of Consols equal, at the price of this day, to a sum of 500*l.*, and interest at 4 per cent. from the end of the year after the decease of the testatrix, to an account intituled "The contingent account for building and endowing a church at *Stow Bridge*"; and inquire whether there are any means of applying the fund so carried over in or towards the building or endowing of a church at the said place.

## TAFT v. HARRISON.

Feb. 24*th*.

THE Plaintiff was the registered proprietor of seventy shares in the *Sunderland Joint Stock Banking Company*, upon which 7*l.* 10*s.* per share had been paid. In September, 1851, the Plaintiff sold his shares at 2*s.* 6*d.* per share to one *Shortland*, and applied to the directors of the company for their consent to the transfer of the shares to the purchaser. The directors refused to consent to the transfer, and, as the Plaintiff alleged, assigned no other reason for such refusal than that they did not wish to alter the list of shareholders until the annual meeting in the ensu-

The deed of settlement of a joint-stock banking company provided, that no person should become a shareholder without the consent of the directors; and in case the board should refuse to consent to any transfer of shares, they should, at the request of the

holder, be obliged to purchase the same out of the funds and on behalf of the company, at a price, in case the parties should not agree, to be fixed by arbitration. The Plaintiff contracted to sell his shares, but the board refused to consent to the transfer, and he then required the board to purchase them. The Plaintiff's shares not being purchased for the company, and an action being afterwards brought against him for calls made subsequently to his application to sell them, he filed his bill to compel the company to purchase the shares, and to restrain the action. On a motion for the injunction,—*held*, that the fact, that, at the time the application was made by the Plaintiff to the board to purchase his shares out of the funds and on behalf of the company, and thenceforward, the company had no funds applicable to the purchase of shares, was a defence to the equity of the Plaintiff, founded on the provisions of the deed to compel such purchase; that it did not follow from the absence of such funds of the company, that the board of directors was, therefore, under all circumstances, bound to adopt the alternative of permitting the Plaintiff to transfer his shares to any other person; and *held*, also, that the fact of the price at which the Plaintiff had contracted to sell his shares shewing that they were then nearly valueless, and the further fact, that, in the following month, the banking company suspended its payments, afforded sufficient *prima facie* evidence that the board were justified in not purchasing or permitting the transfer of the shares, to induce the Court to refuse to stay the action for calls until the hearing of the cause, except upon the terms of bringing the amount into Court.

*Held*, also, that the question, whether the board were justified by the facts of the case in refusing either to permit the transfer of the shares or to purchase them for the company, was a question to be tried in equity.

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ing month of February. The Plaintiff having in vain endeavoured to induce the directors to permit the transfer of the shares, in October, 1852, applied to them to purchase his shares out of the funds of the company, at a valuation, in pursuance of the provision of the deed of settlement. The material provisions on this subject were as follows:

That no person should become or be registered as a shareholder, without the consent of the board of directors, who might, on the application of any shareholder or other person entitled to dispose of any shares, testify such consent by a certificate in writing signed by three of the directors.

That, in case the board of directors should refuse their consent to any transfer of shares, they should, on the request of the holder thereof or other person entitled thereto, be obliged to purchase the same out of the funds and on behalf of the company, at such price or sum as should be fixed, in case the parties should not agree, by two indifferent persons, one to be chosen by each party or their umpire.

The directors refused to comply with the Plaintiff's request, or to appoint any person to value the shares; and, a short time afterwards, the company suspended its payments, and the directors proceeded to wind up the affairs of the company under the provisions of the deed. A call of 2*l.* 10*s.* per share was afterwards made; and the Plaintiff having refused to pay the sum demanded, an action was brought against him by the Defendant as the public officer of the company for the recovery of the amount. The Plaintiff thereupon filed his bill, praying, that the company might be decreed to purchase his seventy shares at the price of 2*s.* 6*d.* per share, or at such other price as might be ascertained to be the fair value of the shares at the time the Plaintiff contracted to sell them to *Shortland*; that the Plaintiff's name

might be removed from the register of shareholders; and that the proceedings at law against him for the recovery of the calls might be restrained.

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Statement.  
Argument.

Mr. J. Russell and Mr. Hetherington, for the Plaintiff, moved for the injunction(a).

VICE-CHANCELLOR:—

It is clear that this injunction cannot be granted, unless upon the terms of the Plaintiff paying into Court the amount for which the action is brought. There is, as it appears to me, a case to be tried in this Court. The directors did not consent to the sale of the Plaintiff's shares; and that being the case, the Plaintiff was entitled to the benefit of the provision, that they should be purchased and paid for out of the funds of the company. The Defendant does not deny that the articles of partnership or deed of settlement of the company gave the Plaintiff this right; but the answer which he gives is, that the company had no funds out of which to make the purchase. If that case be made out on behalf of the company, I think, upon the construction of the deed, the Court must hold that they were entitled to say they would retain the Plaintiff as a shareholder. The facts, as they appear upon this motion, certainly do not tend to negative the probability that the company had such a case. The payments upon the shares had been 7*l*. 10*s*. each, and the Plaintiff had, nevertheless, contracted to sell them at 2*s*. 6*d*. per share. These facts do not indicate that the company was at that time in very high credit or repute. The application to the directors to purchase the shares

Judgment.

(a) The practice as to special injunctions and injunctions to stay proceedings at law had been assimilated by stat. 12 & 16 Vict. c. 86, s. 58.

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 TAFT  
 v.  
 HARRISON.  
 —  
*Judgment.*

out of the funds of the company was made on the 9th of October, 1851; and it appears by the statements of the bill, that, in the month of November—it is not said on what day—"the company suspended its payments, and the affairs thereof have been from that time and are now in the course of being wound up under the provisions of the said indenture of the 22nd of December, 1836, in that behalf." The case of the Plaintiff, therefore, is, that the company are pursuing the provisions of their partnership deed to wind up their affairs; and I think there is in their case, *prima facie*, enough to shew that, at the hearing, it may well appear that they had at the time of the Plaintiff's application no funds in hand to enable them to comply with it; and, if that were so, I do not conceive the company were bound to adopt either of the alternatives presented to them: that they ought either to admit instead of the Plaintiff the purchaser whom the Plaintiff thought proper to tender, or to purchase shares for which they had no funds to pay. The question, whether the company was or was not in possession of funds applicable to the purpose provided for by the deed, is a question to be determined here, and if the amount of the calls be secured, the action ought not to go on.

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*Minute.*  
 —

The Plaintiff giving judgment in the action, and bringing into Court on or before Monday next 175*l.*, to be dealt with as this Court shall direct, stay the proceedings at law, and reserve the costs of the motion. If the 175*l.* be not paid into Court by the time mentioned, refuse the motion. Liberty to apply, and for the Plaintiff at law in the mean time to give notice of trial.

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Mr. *Daniel* and Mr. *Stevens* for the Defendant, intimating that he did not object to the action being stayed upon the money being brought into Court, were not called upon to argue the case.



1858.

July 2nd, 4th,  
5th, 6th, 7th,  
& 28th.

BLISSET v. DANIEL

THE bill was filed by *Charles Blisset*, one of the partners in a firm carrying on the business of melting and making copper, brass, and mixed metals, at *Bristol, Swansea*, and elsewhere, under the name of "*John Freeman and Copper Company*," against *Thomas Daniel* the elder, *Thomas Daniel* the younger, *William Cave*, and *Philip Vaughan*, the other surviving partners in the same firm, and the trustees of certain partnership property; and it prayed that a notice of expulsion, signed by certain of the Defendants, whereby it was their intention to expel the Plaintiff from the partnership, might be declared inoperative and void, and that the partnership accounts might be taken, the partnership dissolved, and the assets ascertained, realised, and distributed in the usual way; or, if the

Articles of partnership provided, that it should be lawful for the holders of two-thirds or more of the partnership shares for the time being to expel any partner, by giving him notice thereof under their hands in the form thereby prescribed; and that immediately after giving such notice a notice of the dissolution as to the expelled partner should

be signed by the partners and published, with power to any other of the expelling partners to sign the name of the expelled partner; and it was provided, that, if a partner became bankrupt, insolvent, or was expelled, his interest should cease, as to profit and loss, as if he had died on the day of such bankruptcy, insolvency, or expulsion; and that the amount of his share should be ascertained and payment secured by the same arrangement as would have been applicable in case of his decease; and it was also provided, that the shares of retired, deceased, bankrupt, insolvent, or expelled partners should be disposed of in such way, either to or between some or all of the continuing partners, or by the admission of a new partner or partners, as the holders of a majority of shares should determine. The articles provided, that, in the case of making certain arrangements, there should previously be a meeting of the partners in committee, but did not express that any such meeting should be necessary previous to the exercise of the power to expel. The article also provided for the adjustment of the partner's accounts within sixty days after the 30th of June in each year, when an inventory of all the stock, debts, &c., should be made, with proper allowances, so as to ascertain the partnership property, profit and loss, and the shares of the respective partners, which shares were to be carried to their respective accounts; and it was provided, that the share of any partner who might wish to retire, if his retirement were consented to by the majority of the others, was to be taken by the continuing partners at the amount at which the same stood at the time for making the yearly rest or settlement next preceding; and that the surviving partners were also to take the shares of a deceased partner at the amount at which the same stood at such next preceding yearly rest or settlement:—*Held*, that the power of expulsion of a partner might be exercised by two-thirds of the partners without any previous meeting of the partners in committee upon the question, and without any cause being assigned for such expulsion; but that the power must be exercised with good faith, and not against the truth and honour of the contract.

That such a power must be understood to exist, not for the benefit of any particular parties holding two-thirds or more of the shares, but for the benefit of the whole society or partnership.

That it could not be exercised merely to enable the continuing partners to appropriate to themselves the share of the expelled partner at a fixed value less than the true value.

That the power was not properly exercised at the exclusive instance of one partner, and, in consequence of his representation to the other partners, made without the knowledge and behind the back of the partner who was to be expelled, and without giving to such partner the opportunity of stating his case, and of removing any misunderstanding on the part of his co-partners.

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 BLISSET  
 v.  
 DANIEL.

Court should hold that the notice of expulsion determined the partnership as to the Plaintiff's share, that the Plaintiff might be declared to be entitled to the real value of his share, and that the same might be ascertained under the direction of the Court; and that the real and leasehold property and plant of the firm might be sold; and for an injunction and receiver in the meantime.

The Plaintiff was the great grandson of the *John Freeman* whose name the company bore, and in 1839 he succeeded his father as a partner in the concern. Articles of partnership were executed by the firm in 1844, which, with the exception of the expulsion clause upon which the question in this suit turned, were substantially the same as the articles under which the business of the firm had been previously carried on by successive partners for upwards of a century. The articles of 1844 were executed by the Plaintiff, the Defendants (the *Daniels, Cave*, and the elder *Vaughan*), and by *E. Jenkins* and *G. Smith*, two partners, since deceased. The deed recited that the parties were the sole proprietors of the partnership property, and had agreed to carry on the business for fourteen years from the 30th of June then preceding, and the parties thereby covenanted with each other, among other things, as follows:—To carry on the trade for fourteen years, determinable as hereinafter mentioned. The then present capital, joint-stock, debts, and assets of the company, including the freehold and leasehold hereditaments, to form part of the capital to be employed in the trade, and to be estimated at the value of 72,000*l*. The capital employed to be 112,500*l*., and to be considered as divided into twenty-five shares of 4500*l*. each, sixteen of which (equivalent to the value of the capital or stock) being considered as possessed by the parties, and the remaining nine as being in suspense, until allotted to any person who should be admitted, or to any partner allowed to increase his shares. Partners holding two-thirds of the shares to

have power to admit new partners, or to allow the existing partners to increase their shares by taking all or any of the nine shares in suspense. The partners to meet in committee at such times and places as the holders of a majority of shares for the time being should appoint, for the purpose of inspecting, resolving, and determining on the conduct and management of the affairs of the partnership as therein mentioned. The books of account and all other documents to be deposited where the holders of a majority of shares shall direct, and to be open to the inspection of all the parties and their respective representatives. The parties to be true and faithful to each other in all transactions relative to the partnership, and from time to time to make and give a just and true account and disclosure to, and consult and advise with, each other in and about the business and concerns thereof when and so often as there should be occasion. The partners yearly, upon or within sixty days next after the 30th day of June, to meet together in the counting-house of the partnership, and then and there state, settle, and finally adjust all the accounts of the partnership, and make a rest or settlement therein up to the said 30th day of June; to which end the said parties shall and will make an inventory, estimate, and valuation of all their joint stock in trade, goods, wares, merchandises, utensils, and implements of trade, monies, securities for money, and other effects, and shall and will make an inventory of all the debts and sums of money which shall be then due and owing to the partnership, making, out of the amounts of such inventories, estimates, and valuations, all proper deductions and all due and reasonable allowances for loss by decay or deterioration of goods, and for debts which shall be bad, desperate, or doubtful; And, likewise, make an inventory of all such debts, duties, and sums of money as shall be then due and owing by or from the partnership, and shall and will bring the same accounts to a balance, so as to ascertain the capital joint-stock of the partnership, and the net and clear gains

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 v.  
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 —  
*Statement.*

1853.  
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v.  
DANIEL.  
*Statement.*

and profits which shall have been made thereby, or the net and clear losses that may have been incurred therein; And also the several and respective shares of the said parties of and in the said capital, joint-stock, and gains and profits or losses respectively; and shall and will thereupon carry such shares to the debit or credit sides (as the case shall be) of the respective private or separate accounts of the said parties with the partnership, which said private or separate account shall also be brought to a balance; so that the true state and condition of the partnership or joint trade, and the respective shares and interests of the said parties therein may clearly and plainly appear. And that, when such rest or settlement shall be so made as aforesaid, the same shall be signed and subscribed by the said parties respectively, in testimony of their having approved of and allowed the same; after which no such rest or settlement shall be opened or controverted unless some error shall plainly and manifestly appear upon the face of the same to the amount of 1000*l.* or upwards, and shall be detected within six calendar months next after such rest or settlement shall have been so signed or subscribed, and then only for the correction of such error. And in case either of the said parties shall neglect or refuse to sign and subscribe such rest or settlement by the space of three calendar months next after the same shall be so made, without stating his objection thereto in writing, and delivering the same unto the other parties or one of them, and leaving the same at the counting-house of the partnership for them or him, so and in such manner as that such objections may be examined and the validity thereof ascertained, every such rest or settlement shall be taken and considered as binding and conclusive upon the party or parties so neglecting or refusing, and all the other parties and their respective executors and administrators in like manner, as if the same had been signed and subscribed as aforesaid. Any partner to be allowed to retire with the consent of so many of the other partners as shall

hold a majority of the shares in the partnership, and all the continuing partners to take to his share in the stock, trade, monies, debts, and effects of the partnership, and pay him the amount thereof as the same stood at the time for making the yearly rest or settlement next preceding such retirement, with interest at 4*l.* per cent. per annum from that time to the time of payment, together with all subsequent advances which the retiring partner might have made and like interest thereon, and deducting any subsequent payments which might have been made to him; the payments to be made by instalments, and mutual releases to be executed as therein mentioned. If any partner should die, the survivors to take to the whole of the stock in trade, monies, debts, and effects, and at the end of twelve months from the death pay to his executors, &c. his share of the capital joint stock as the same stood at the time for making the said yearly rest or settlement next preceding such decease, with like interest from such last-mentioned time to the time of payment, with any subsequent advances and interest, making deductions in respect of subsequent payments, and with mutual releases. "That it shall be lawful for the holders of two-thirds or more of the shares for the time being from time to time to expel any partner, by giving to or leaving for him at his then or last place of abode in England or Wales a notice in writing under their hands of such expulsion, which, in such event, shall operate from and at the time of the giving or leaving such notice, and shall be in the following form, namely, 'We do hereby give you notice that you are expelled from the partnership carried on under the firm of *John Freeman and Copper Company*. Witness our hands this — day of —, in the year of our Lord, 18—. That, immediately after the giving or leaving of any such notice, a notice of the dissolution of the said partnership, so far as relates to the expelled partner, shall be inserted in the London Gazette and such provincial newspapers as two thirds in number of the continuing part-

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Statement.

ners shall think fit; which notice shall be in the following form:—'Notice is hereby given, that the partnership carried on under the firm of *John Freeman and Copper Company* was dissolved on the — day of —, so far as concerns the share and interest of the undersigned — therein;' and which last-mentioned notice shall be signed by all the partners by whom the first-mentioned notice shall be signed, or the survivors of them, any one of whom shall have power to sign the name of the expelled partner, and also the names of every one of the partners who should not sign the first-mentioned notice. That in case any or either of the said partners shall become bankrupt or take the benefit of any Act or Acts passed or to be passed for the relief of insolvent debtors during the said partnership, or shall be expelled therefrom, the interest or share of such bankrupt, insolvent, or expelled partner shall cease as to profit and loss, in the same manner as if he had neither become bankrupt, insolvent, nor been expelled, but had died on the day whereon he shall be declared bankrupt, apply for his discharge, or be expelled; and that the same arrangements shall be adopted for ascertaining the amount of his share, and for securing payment thereof, with interest or otherwise, as would have been applicable to the event of his decease. That the retirement, death, bankruptcy, insolvency, or expulsion of any one or more of the partners shall not occasion a dissolution of the partnership as to the others of the partners. That the shares of retired, deceased, bankrupt, insolvent, or expelled partners shall be disposed of in such way, either to or between some or all the continuing partners, or by the admission of a new partner or partners, as the holders of a majority of the shares which shall belong to the partners present at any such meeting as aforesaid may determine; one calendar month's notice in writing, signed by one or more of the continuing partners, having previously been delivered to or left for at the then or last place of abode in England or Wales

of each of the other partners, signifying his desire that such shares shall be disposed of; and until they are so disposed of they shall continue at the joint risk of profit and loss of all the continuing partners, in proportion to the interest they shall respectively hold in the concern, who shall, if so directed, by an entry in the committee book, forthwith bring into the said concern the full amount of the capital which shall thus be rendered deficient in the proportions in which they are respectively interested, and shall respectively be charged in their respective accounts current with interest on the amounts which should respectively be brought in, until the same are paid." The holders of three fourth parts of all the shares in the concern may, by a resolution to that effect, to be entered in the committee book at any committee meeting, dissolve the partnership at such time or times as shall be expressed in such resolution, one month's notice having been given of the intention to propose such resolution. Upon the dissolution of the partnership, either by the means last aforesaid or by effluxion of time, the parties to meet in the counting-house, and there state and, so far as the nature and circumstances of the case will then admit, settle and adjust all the accounts of the partnership; to which end they shall make an inventory, estimate, and valuation of all their buildings, works, estates, and other joint stock in trade, goods, wares, merchandises, utensils and implements of trade, monies, securities for money, and other effects, and an inventory of all the debts and sums of money then due and owing to the partnership, and also an inventory of all debts, duties, sums of money then due and owing by or from the partnership, and shall bring the same accounts to a balance; and shall then sell and dispose, collect, and get in the works, stock in trade, debts, and effects of the partnership with all practicable expedition, and satisfy all such debts then due and owing by the partnership, and the costs, charges, and expenses of the said parties and sales; and as to the residue of such monies, as often as the same

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v.  
DANIEL.  
—  
*Statement.*

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 v.  
 DANIEL.  
 —  
*Statement.*

shall amount to the sum of 2500*l.* or upwards, divide and pay the same residue unto or between or amongst themselves in proportion to their several rights, shares, and interests in the said capital, and joint-stock, and the clear gains and profits thereof, making all due allowances, until the whole of such residue shall be exhausted.

The deed concluded with an arbitration clause in case of differences, nearly in the ordinary form.

Some increase had been made in the shares of the partners by the appropriation of part of the suspense shares before 1848. After the rest or settlement in 1848, *E. Jenkins* and *G. Smith* died, and the amount of their shares was accounted for and paid to their respective representatives according to the provisions in the articles. *Philip Vaughan*, one of the partners, was the manager, at a salary of 800*l.* a year, and an annual donation of 250*l.* *Philip Henry Vaughan* his son, who was employed as clerk of the firm, came of age, and was admitted to one share in 1850, at the price of 4500*l.* After the time of the rest or settlement in 1850, some circumstances occurred, which, so far as they are material, are stated and commented upon in the judgment. On the 29th of August, 1850, the Plaintiff attended a meeting of the partners, and signed the accounts and documents, which had been made up to the 30th of June preceding, according to the direction in the articles; and on the evening of the same day he received a notice, signed by *Thomas Daniel* the elder, *W. Cave*, *Philip Vaughan*, and *Philip Henry Vaughan*, in the form prescribed by the articles (a), signifying that he was expelled from the partnership, together with a letter from the solicitors of the other partners, requesting him to sign a notice of dissolution in the form also thereby prescribed.

(a) *Supra*, p. 501.



*Thomas Daniel* the younger was at this time absent from *Bristol*. The Plaintiff refused to sign this notice, but the signature of the Plaintiff was added by the other parties, and the notice was so published in the provincial papers. The accounts made up to the 30th of June, 1850, stated the three shares of the Plaintiff at 4500*l.* each, amounting to 13,500*l.*, as expressed in the partnership deed, and stated the balance due to the Plaintiff on the profit account to be 5095*l.* 4*s.* 3*d.* For these sums, amounting to 18,595*l.* 4*s.* 3*d.*, together with interest, the other partners made and tendered to the Plaintiff their promissory note, together with a release, requiring the Plaintiff also to execute a release, as expressed in the articles.

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 v.  
 DANIEL.  
 —  
*Statement.*

The Plaintiff insisted that the other partners were not entitled to exercise the power of expulsion contained in the articles in the manner they had thus attempted to use it; and he insisted moreover, that, even if they could expel him from the partnership, they were not entitled to take his shares except upon a sale of the partnership property or upon a true valuation; and he alleged that the sums of 13,500*l.* and 5095*l.* 4*s.* 3*d.* did not in truth represent the real amount of his share and interest; for that the yearly accounts made up to the 30th of June, 1850, were in great part only approximated and conjectural estimates, designedly kept far within the real truth, for the purpose only of shewing what amount of profits could with absolute safety be considered as realised and be divided. The Plaintiff, therefore, filed his bill to be reinstated in his rights as a partner, or to recover the full value of his share. The bill also impeached the act of expulsion on other grounds, both of form and substance, which it is not necessary to mention, as nothing ultimately turned upon them.

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BLISSET  
v.  
DANIEL.  
—  
*Argument.*

The *Solicitor-General*, Mr. Rolt, Mr. W. M. James, and Mr. Selwyn, for the Plaintiff, argued that his expulsion had not been determined upon in a committee of the partners, or with due or any proper deliberation; that it had been determined upon secretly, and without giving the Plaintiff any opportunity of discussion or remonstrance; that no cause for the expulsion either existed or was even assigned; that the Defendants or some of them, having entertained an intention of forthwith exercising the power of expulsion, by concealing that intention in effect inveigled the Plaintiff into adopting and signing the estimates and accounts of the partnership property up to the 30th of June, 1850, which accounts represented the property of the partnership and the share of the Plaintiff therein far under their true amount; that the accounts were in fact signed by the Plaintiff and by the Defendants with an entirely different object and meaning,—by the Plaintiff, on the supposition that his interest was a continuing interest, and without any reason to suspect that he was about to be removed from his position as a partner; and by the Defendants, with the intention of immediately expelling him; and that, under such circumstances, the Plaintiff ought to be restored to his rights as a partner; or if, on the other hand, the notice was sufficient to expel him, that the partnership property should be sold and the amount of the Plaintiff's share ascertained as upon an ordinary dissolution.

Sir Fitzroy Kelly, Mr. Malins, and Mr. Osborne, for the Defendants, relied upon the expressed intention of the articles, and on their literal interpretation. They insisted on the fact, that the course of the partnership had always been to pay for the shares of the deceased and retiring partners according to the annual account and settlement of the 30th of June preceding the death or retirement; and argued, that the whole spirit and intention of the articles was to preserve the partnership property from a forced sale, and to

keep the partnership in existence, notwithstanding it might cease or be dissolved as to individual partners. They contended, that it was not necessary there should be any consultation by all the members of the partnership previous to the expulsion of a partner, as the absolute power to expel was given to the two thirds, without the concurrence of the other third.

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BLISSITT  
v.  
DANIEL.  
Argument.

VICE-CHANCELLOR:—

There are three general heads, under which the questions in this cause may be mainly ranged; and these are, First, whether the power of expulsion which is contained in the articles of partnership in this case can be exercised, without any cause assigned, by two thirds of the partners, and by their signing a note expressive of their intention to effect the dissolution, in the form prescribed by the articles, without any previous meeting in committee with each other. Secondly, how the share of the expelled partner is, in that case, to be valued according to the terms of the deed, and whether any means of so valuing it existed at the date of the notice of dissolution, which was given on the 29th of August, 1850. Thirdly, whether the power which has been in this case exercised has been so exercised as that the Court can give effect to it, even assuming the valuation which was to be made could be made according to the terms of the deed.

Judgment.

On the first point I have come to the conclusion that the view taken by the Defendants is correct. On the other two points I think the case is with the Plaintiff. I have not, therefore, considered a fourth point which has been raised, which was a subordinate point, especially after the conclusion I have come to on the consideration of the whole case, namely, the question whether there was or not, in fact, a notice signed by two thirds of the partners under the cir-

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BLISSET  
v.  
DANIEL.  
—  
*Judgment.*

cumstances of this case, and considering the peculiar manner in which *Philip Henry Vaughan's* share was circumstanced. I have not gone into that in any detail; but I think it is quite enough to say, that, if the case had rested upon that, I could not have come to the conclusion, that I ought to have decided in favour of the Plaintiff upon the objection raised upon that point.

Now, with regard to these main points which arise in the consideration of the case:—First, as I have said, the question is, whether there is an absolute power of expulsion to be exercised by two thirds of the partners giving a notice in the form stated in the deed, and without any previous consultation or meeting in committee. I think it is impossible, looking at the clear words of the deed, to say, although the word “expel” is used, that it was necessary for the parties, especially looking at the form of the notice which was provided, to assign any ground for the expulsion, or for their intention to put an end to the partnership as between themselves and their co-partner. I consider that it is in their power to do it of their own sole authority; and that it was not necessary that there should be any previous meeting of the committee, appointed by one of the clauses of this deed for the settlement of the affairs of the partnership. Many clauses have been called to my attention, expressly directing that in certain cases those meetings of the committee shall take place, and, there being no such clause expressed in this particular part of the articles, I must conclude that it was not intended that in this case any such consultation or meeting of the committee should be held. I find it is expressed with reference to a retiring partner; it is expressed with reference to the salary of the managing partner; it is expressed with reference to the dissolution of the partnership, as to the concurrence of the three fourths of the parties present. In all those cases there must be a previous meeting of the committee held; but, in this parti-

cular case, with reference to the expulsion of a partner, there is no such clause. I hold that the Defendants are correct in their contention, and that it was not necessary that they should hold the previous meeting, or that they should express or establish any definite cause for inducing them to give the notice in question.

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v.  
DANIEL.  
—  
*Judgment.*

Now, the other two questions are questions which require considerably more investigation; and the first thing that one has to regard with respect to that is, in what mode, looking to the whole of this instrument, was it intended, in case a partner should be expelled, that his interest should be acquired by the remaining partners. Now, I need not say that the construction of the deed in this respect must be a construction of the strictest character. I think Mr. *Ward* (a) has not at all improperly expressed, in his letter, the view that any Court of equity would be disposed to take of any power of this very stringent character, when he said, in his letter of the 6th of January, 1850, to Mr. *Daniel* junior, that everything will be construed in a Court of equity strictly against the partners exercising the power of expulsion. I think Mr. *Ward* took a very correct view of what must, necessarily, be the course of this Court in construing such a power; and it is, therefore, taking a very strict view of the right of the parties as against the parties exercising the power of expulsion, that I am to address my mind to the precise stipulations contained in the articles themselves.

The power is one of the most strict character, being, as I said before, one which requires no cause whatever to be expressed, or assigned, or entertained by the parties exercising it; and, when I come to the other branch of this case, I shall proceed to state, that, in my opinion, it has been exercised in that manner in this case, and without any cause whatever other than the will of the parties—that it is exercised simply on the strict right reserved to the parties of

(a) The Defendant's solicitor.

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BLISSET  
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DANIEL.  
—  
*Judgment.*

determining the partnership. Now, that being so, observe for a moment the conclusions which result from a notice of this description. The partners who give the notice, being two thirds in number, by that means acquire at once a right of purchasing for themselves (the partnership) the share of the retiring partner, at the price which is to be fixed by the stipulations in the deed. Further than that, the majority of the partners in a meeting,—and two thirds would, of course, be this majority, especially after the expulsion of the other partner,—the two thirds may decide how those shares are to be appropriated. The expelling partners have the power, therefore, of appropriating to themselves, if they think proper, at the price to be fixed according to the provisions of the deed, the share of the partner whom they have so expelled; neither is there any limitation of the time or period at which this notice is to be given. It would be pretty certain not to be given at any time when the trade was depressed. It may be given at a time of the greatest prosperity. It may be given in the very last year of the partnership, when the whole partnership is about to be wound up and realised, in case the partners should consider it expedient so to do. Looking at the circumstance that these parties put themselves in the position of purchasers of the share at the price stipulated in the articles, it is quite clear, that, for the protection of the expelled partner, those articles should be construed in the strictest possible manner, and there should be a mode of valuing the share at the time of his expulsion which should be entirely consistent with the stipulations he has entered into. It has been said, on the part of the Defendants, that you must take him to be in a position exactly similar to that of a deceased partner, a bankrupt partner, or a retiring partner. It may, perhaps, be so, but the only result would be, that, in that case equally, all those other parts of the articles would have to be construed strictly. It would not be, that you should give a more lenient interpretation, if I may so express it, with reference to the share of an expelled partner.

Now, the provisions of the deed are somewhat singular with reference to this particular event that has happened. I quite agree with the remark, that the deed has been prepared with a great anxiety to achieve this object. The partnership having been one of more than 100 years duration at the present time, and of nearly, if not quite, that time when the articles were prepared in 1844, I conceive the object of the partners to be expressed thus:—‘We do not wish to subject this concern, which has been so long carried on with profit to all engaged in it, to the various vicissitudes which occur by the death or bankruptcy of partners; we wish to be in such a position as not to have our concern broken up by any of those events taking place, but to make provisions in the deed by which, instead of the right being that which the law would otherwise confer upon the executors of deceased partners or the assignees of bankrupt partners, of having the value of the share ascertained in the only mode in which it could then be ascertained, by a sale, we will take care to make stipulations to prevent the breaking up of the partnership in any of those events, by ascertaining beforehand the exact value of the share that is to be paid to the executors of the deceased partner or assignees of the bankrupt partner, or others who may represent other removed partners, and so, in either event, handing over the amount of their several shares, enabling the continuing partners to continue the business without being disturbed by a forced sale of the general property of the partnership.’ That was, no doubt, the scheme and intent of this deed; but the mode in which they have provided for it, I think, has not been so felicitous as Sir *Fitzroy Kelly* seemed to suppose. In the first place, he suggested that this very introduction of the clause enabling two thirds to expel the remaining partner, was of itself an addition of importance: as providing for a case in which, from incompatibility of temper and character, independently of the usual provisions which are often contained in these deeds, of bankruptcy, insolvency, or miscon-

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BLANNEY  
v.  
DANIEL.  
Judgment.

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BLISSET  
v.  
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—  
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duct, there should be the means at once of determining that partnership, with respect to a partner as to whom it should be found—as has been said in this argument—impossible to carry on the business. Whether or not that was a prudent course, I think, may be extremely doubtful, with regard to any deed of this description. Unquestionably, in the mode in which it has been here exercised, and the result which has followed from such exercise of it, I think it will be found to have been a very disastrous clause that has been so introduced. The partnership had gone on very well for eighty years without any such clause, down to the year 1823. It had gone on without any exercise of the power extremely well, down to 1850, being, as I have said, upwards of 100 years; and I am bound to hold, upon the whole of this case, that the clause, as it has now been acted upon, has not been used in a manner which can in any way prove that its insertion has been beneficial to the partnership. Carefully considering the clauses of the deed, I find these provisions: They first of all state that “the present capital, joint-stock, debts, and effects,” which, be it observed, must comprise the whole property, and not only the peculiar property which I shall have to speak of afterwards, which has been valued in so singular a manner, but the whole property of the partnership,—“the present capital, joint-stock, debts, and effects of and belonging to the said parties hereto, including the said freehold and leasehold hereditaments, shall form part of the capital to be employed in the said trade, and shall be estimated and taken as being of the value of 72,000*l*.” They then provide “that the capital to be employed in carrying on the said trade shall be the sum of 112,500*l*., to be considered as divided into twenty-five shares of 4500*l*. each, sixteen only of which, being equivalent at that rate to the value of the plant, stock in trade, debts, and effects as the same stood on the 30th day of June last,”—an expression to be observed upon—“shall be considered as occupied by the several parties hereto.” Then the provision is, that the remaining nine



are to be held for the present in suspense, or, in other words, that they were for the present to be considered as trading on a capital of 72,000*l*. There are then provisions for taking those suspense shares out, each such suspense share being, in all cases, taken at the sum of 4500*l*. It is then provided that this sum of 72,000*l*., and all other sums which shall be brought in by taking shares out of suspense, making the 112,000*l*., shall remain in the partnership during the continuance of it, to be employed for their mutual benefit; and no part thereof, that is to say, of this capital sum, shall, during the partnership, be withdrawn, except for the purpose of paying the shares of deceased, expelled, retiring, or bankrupt or insolvent partners. The next provision in this deed of any importance is that as to profits:—"That the net profits of the said partnership, after making all proper deductions, and all due and reasonable allowances for loss by decay or deterioration of goods, and by debts which shall be bad, desperate, or doubtful, shall belong to the parties in the shares and proportions in which, under the provisions herein contained, they are respectively interested, or in which they are or may become interested by taking additional shares; and that they shall, on or after the 30th day of September in each year, be at liberty to draw out such profits up to the 30th day of June preceding." Then comes the clause which is the important clause in this branch of the case—that is the clause which provides for the valuation of the shares of partners; and by that clause it is provided, that the parties "shall and will yearly and every year during the continuance of the said partnership, upon or within sixty days next after the 30th day of June, meet together in the counting-house of the said partnership, and then and there state, settle, and finally adjust all the accounts of the said partnership, and make a rest or settlement therein up and home to the said 30th day of June; to which end the said parties shall and will make an inventory, estimate, and valuation of all their joint-stock in trade,

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goods, wares, merchandises, utensils, and implements of trade, monies, securities for money, and other effects; and shall and will make an inventory of all the debts and sums of money which shall be then due and owing to the said partnership, making, out of the amounts of such inventories, estimates, and valuations, all proper deductions, and all due and reasonable allowances for loss by decay or deterioration of goods, and for debts which shall be bad, desperate, or doubtful." And then they shall bring the accounts to a balance, "so as to ascertain the capital and joint-stock of the said partnership, and the net and clear gains and profits which shall have been made thereby, or the net and clear losses that may have been incurred therein; and also the several and respective shares of the said parties of and in the said capital, joint-stock, and gains and profits or losses, respectively; and shall and will thereupon carry such shares to the debit or credit sides, as the case shall be, of the respective private or separate accounts of the said parties with the said partnership, which said private or separate account shall also be brought to a balance, so that—" and this is the end to be attained—"so that the true state and condition of the said partnership or joint trade, and the respective shares and interest of the said parties therein, may clearly and plainly appear." It is then provided further, that, when that is done, it is to be subscribed by the parties, in testimony of their having approved it; and that it shall not be opened, when so signed; except for an error of 1000*l.*, and that within a limited time; and then there is a provision, that, if any partner refuses to sign such rest or settlement by the space of three calendar months next after the same shall be so made, without stating his objection thereto in writing, then it shall be taken as having been signed. There is no provision made in case of his stating a reason and the parties not acquiescing in it. Whether that would have been a difficulty on any future occasion it is not necessary to consider; but the provision is,

that, if he shall not sign it and shall not state an objection, it shall be taken as signed. Then the provision with regard to the share of any deceased partner is, that his share is to be valued "as it stood on the 30th day of June next preceding his death;" and the same provision is extended by the subsequent clauses to the case of expelled and other removed partners, whether by bankruptcy, insolvency, or retirement. Now, the first thing that strikes one in these clauses is, that it clearly must have been intended that an actual valuation should be made of some sort. First, there are sixty days given for the settlement of the account. Those sixty days are not given without reference to the magnitude of the concern, and the time which should be requisite for making the valuation; and, in point of fact, we do find, I am bound to say, great pains taken, regard being had to the peculiar manner in which the valuation was made, as to all such portions of the valuation as were taken, according to the fullest and most precise construction of this particular clause of the deed. As to other parts of the property, it appears to me, in truth, that no valuation has been made; but the sixty days evidently was given for that purpose. Further than that, I should at once say, there is a question raised upon what was the meaning of the words "as the same stood on the 30th of June preceding" with reference to any deceased or retiring partner. I am bound to say, that I consider that "as the same stood" must be taken to mean as it stood in the books of the partnership. I can attribute no other sense to it, fairly looking at the whole of the deed, and more especially to the provision at the beginning of it, which says, that the property had been valued at 72,000*l*. "as it stood on the 30th of June." It stood in the books at that time at that sum. I think that is sufficient to give a clue and meaning to the expressions throughout the deed, and that I must treat it to be as it stood in the books of the partnership.

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A difficulty has been suggested as to what seems to have been in some respect a *casus omissus*, namely, supposing the party died in the interval between the 30th of June and the settlement of accounts in August, one does not very easily see—I do not think it becomes a question of importance in this case—what course would then be taken, the party being entitled evidently to have his share as it stood on the 30th of June preceding his death, and not to be thrown back to the period of the 30th of June in the year anterior to that. It is unnecessary for me now to consider this; but, at all events, the deed has not been framed very dexterously with a view to that particular contingency. When, however, there is an inventory, estimate, and valuation to be made, subject only to all proper deductions, how am I possibly to say that it does not mean that some valuation must be made, something which is, in reality and truth, a valuation,—making the valuation at whatever price the partners might think right and just to put upon it; but something which shewed that they exercised a judgment on the value, and that from that valuation they afterwards made what are called just deductions? I noticed,—and it occurred to me as possible, that it might afford some clue to a just construction of this deed, and Mr. *Osborne* afterwards called my special attention to it,—that particular clause with regard to valuation at the end of the partnership. In that clause there is a remarkable difference, as contrasted with the clause providing what is to be done yearly and in each year during the continuance of the partnership. It is there provided, that, “at the expiration, end, and dissolution of the partnership by any of the means mentioned, the parties shall and will make an inventory, estimate, and valuation of all buildings, works, estates, and other joint-stock in trade, goods, wares, merchandise, utensils, and implements,” as if there was some floating notion in their mind that there would be a difference in their valuation at that time,—that there would be something

more definite done with reference to the valuation of the buildings and works and the estates, as contrasted with the previous estimate already directed to be made; but I cannot see, after all, how I can possibly attribute that effect to it, because, if I gave that construction, it would be to strike out altogether from this yearly valuation any valuation at all, conventional or otherwise, of the estates, works, and effects; a construction which nobody has contended for; and, further than that, I do not see how it would be possible to arrive at what the capital of the concern was, or the mode of estimating the profits, unless you did bring into the valuation yearly the whole of the stock as it then existed, deteriorated or not, as the case may be. And, therefore, although there is that peculiarity and difference in the wording, I do not think it can justify me in holding there is any difference in the construction of this clause.

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Well, then, if this be so, and it be necessary that there should be an exact and accurate valuation of the whole, I have next to ask, what has been done? Has this course been followed? I find, in truth, there never has been from year to year any valuation whatever of a considerable portion of the property. I take the White Rock Works as the leading illustration. It is unnecessary to go into the detail of some other matters. They have been put down from year to year at 5600*l*. Now, that there was no intention, especially when this is to be construed as against an expelled partner, of excluding this from valuation, I must hold to be clear on the face of the deed. It was pressed upon me very strongly, that it was intended that the parties should come in continually at 4500*l*. as the value of the capital, and that therefore they were to go out at 4500*l*. as the value of the capital. But what do I find the scheme of the partnership with reference to capital and profits? The scheme is this:—They make a professed va-

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valuation or estimate of everything, including this property. They then make an estimate of all their debts and other charges, to be set off on the other side. They then deduct the amount of capital as it stands, because they always head the one side with 112,000*l.*, and they put per contra all that remains in suspense; so that it is always the capital as it stands which is the first thing to be deducted. When that is done, all the rest is to be treated as profit, after making, of course, such deductions as are to be made in respect of profit. They do, in effect, purport to have a valuation of the property; and I find that this clause by no means says what it ought to say, if the contention of the counsel for the Defendants is right, that, in making this valuation and inventory, you shall always take the fixed plant and capital at a given sum. That is what one would expect to find in the deed, if it were so intended; but all they say is this:—We have, in the deed, valued the whole of the concern, including the debts and effects of the partnership, at 72,000*l.*, and we have valued it at that sum from the date of the deed; henceforth, on every settlement of the account, you are to take this inventory, estimate, and valuation, only making all proper deductions. Then, in fact, what has been done? Having put down these White Rock Works at 5600*l.*, when the partnership started in 1844, that has been continued in every year, down to the year 1850. It had been taken as the valuation long before at the same price; and the evidence in the case, which I do not find met by any counter evidence on the part of the Defendants, amounts to this:—that, taking the value of the site (if I may so express it) on which the works are built, and the works themselves, with a hundred acres attached to them, and independently of certain canal land and other land, which, of course, must be brought into valuation, the value of that alone is 29,700*l.*, instead of 5600*l.* Can I say, in the face of that evidence, that, on any possible construction, it can be held to be an estimate or valuation of the

property, subject to all proper deductions? In truth, independently of goodwill, the value is 47,000*l.* altogether; but I have taken, as the best illustration, the simple valuation of the site of the property and buildings, and which is proved to be 29,700*l.* instead of 5600*l.* There is no counter evidence,—there is no valuer to meet it on the other side. It is proved that the property tax paid is 550*l.* Even that would be quite sufficient. This property tax is paid in respect of the property itself, not in respect of the profits of the business; and a property tax of 550*l.* I think I must hold to represent a sum considerably exceeding 5600*l.* So, again, as to the poor rate, 443*l.* A poor rate of 443*l.* represents a capital of some 9000*l.* or 10,000*l.*, to say the least; certainly very far exceeding 5600*l.* In plain truth, there has been no valuation whatever of this property; and therefore it appears to me clearly, that nothing has ever been done pursuant to this clause,—which I am bound to construe most strictly,—that could enable the parties on such a valuation to have a dissolution according to this clause.

But there remains another question—It is said, true it may be, we have not valued according to the clause, but the parties have met together from time to time, and they have substituted this mode of taking the valuation for what would be a strict valuation according to the clause, making all proper deductions; and they say we may put it higher than that; we may say, if the parties so meet, and they so agree on this conventional value, such as it is, you may call it a valuation within the clause with the proper deductions. Certainly before I can arrive at that conclusion, I must see that it was most plainly and distinctly intended by the partners with the view of meeting all the various contingencies of removal of a partner, including this removal by expulsion. Then, for that purpose, I turn to the statement made by the Defendants themselves, of the

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reasons and grounds upon which this peculiar proceeding, instead of actual valuation, has been adopted. I find this is what the Defendants state in their answer as the reason for adopting this particular mode of valuation. They first of all speak of the price of copper varying very much, and being subject to certain great fluctuations, and so on. They then severally say "that this circumstance and the obligation imposed by the said articles on the surviving and continuing partners for the time being in the said firm to take the shares of retiring and deceased partners at the sums at which the shares respectively stand in the said partnership books, have rendered it necessary that the accounts of the said partnership should be so taken as to secure such surviving and continuing partners from future loss, arising from depreciation in the property and effects of the said partnership; and they accordingly say, that, with this view, it has been for many years last past, and from a period anterior to the year 1839, the practice of the said partnership, in taking the said annual accounts, to contemplate the possibility of a disastrous termination of the said business, and to look forward to the possibility of a sale becoming necessary under the most disadvantageous circumstances, and to take care that there should be sufficient assets, even under such circumstances, for discharging all the liabilities of the partnership, including the amount of capital due to the partners respectively;" and they say, "that, with the view aforesaid, in all the annual estimates of the fixed property, works, and plant of the said partnership, the same have been valued, not in any respect with reference to their actual cost, or what they would be worth as a going concern, but with reference to the position of the partners in the said firm under the said partnership articles, and at sums which, after full consideration by the partners of all the circumstances affecting the said properties, works, and plant, and the said trade, it was fairly considered the same would realise, in the event of the



same being brought to sale by the stoppage of the concern." That is the principle which they state to have induced them to put these particular fixed values, or, in other words, to make no valuation, but to set a nominal and conventional value on all this property; and they say, that that is one mode of making the proper deductions in respect of the valuation,—a mode adopted with regard to retiring and deceased partners, and the necessity imposed on the remaining partners of purchasing the shares. How has a valuation come to upon that basis, and for those reasons, any relation whatever to the case of an expelled partner, when the expelling partners are not compelled to take the shares, but when they themselves acquire the shares by their own act, and by their own express wish and intention? I can understand, that, looking to death, which may happen to any one or other of them in the course of the year, the parties might well say, "If either of us die, and there be this sudden difficulty thrown upon the firm—we know not when—it may be at a moment of pressure, and when these disastrous circumstances are likely to take place;" or, looking at a case of a party retiring at his own solicitation, and therefore knowing all the circumstances fully beforehand,—they might say, that this was a reasonable and proper course, although perhaps not strictly according to the terms of the articles, but amounting to a new arrangement and agreement between the parties; but it has not the slightest bearing on a case where the parties exercising their own option insist on becoming purchasers of the share of the expelled partner. If such a case had ever been contemplated,—it is in evidence that this expulsion clause had never been thought of by anybody;—but if anybody had considered the question of what was fair, right, and just, with reference to the expelled partner, it is impossible to say that that is to be put upon the same footing, or that it ought to be so valued as if you were compelled to take the property, or as if the whole property were about to be disposed of on a disastrous termina-

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tion of the partnership. In truth, as to the deceased partner, he loses all interest on his death. The retiring partner voluntarily renounces all the accruing profits coming to him. The bankrupt or insolvent partner in like manner becomes, by operation of law, disentitled to any remaining profits. But the expelled partner has all future profits forcibly taken from him. He is driven out of what is a going concern; and he is told that he is to be driven out at a price fixed on his property, and that the valuation is to be made as if it were a valuation made under the most disastrous circumstances; whereas the expulsion would never take place in a time of disaster, and may be expected to take place at a time of considerable prosperity, and in the full vigour and force of a going concern. I cannot, therefore, hold that a valuation made on such a principle is a valuation within the meaning of this clause.

There is another point raised as to the reserves, which, I think, is only of importance as conducing further to shew that what these gentlemen have stated is truly stated as the principle on which they proceed. With regard to reserves, it would be monstrous to suppose that any party contemplating the possibility of there being an expelled partner would think it right or proper, with regard to the expelled partner, to appropriate a large portion of his profits for the past year, for the purpose of insuring that in which he would not have the slightest interest—the future insurances, the future chances of litigation, and many other points of a like nature, which occur in these reserves. It would be absurd to suppose that this was in the contemplation of anybody. It would, indeed, offer no difficulty in the way of adjusting the accounts, because of course it is merely a matter of account; and it would be very simple, if an error of that kind had been made, merely to transfer to the expelled partner's share those profits which have been so set aside.

I do not overlook the fact of this gentleman having settled a number of the accounts on this principle with deceased partners, and one, under peculiar circumstances, of a gentleman who knew himself to be dying at the time he settled the account. I do not forget that; but it seems to be entirely consistent with the statement in the answer, that this principle was adopted with reference to a retiring or a deceased partner.

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Being of opinion, as I am, that no valuation in truth has ever been made which would fit the case of an expelled partner, I am next to consider what the effect of that is on giving a notice of this description. I apprehend, if there is no mode of valuing the share, and there appears to me clearly to be no mode except that pointed out by the deed—which is now impossible—then, even for the sake of the Defendants themselves who gave the notice, I am bound to hold that the power cannot be exercised,—to say nothing of the party who is expelled; because, as Sir *Fitzroy Kelly* has well observed, the whole scheme, and frame, and object of the articles was, not to break up the partnership—not to have a forced sale and valuation; and if you can only expel a partner by bringing his share to that forced sale and valuation, the consequence would be, not that he is to be expelled, but that the power of expelling him cannot be carried into effect.

There is a case before Lord *Eldon* of *Jackson v. Sedgwick* (a), where what had happened was this: the partnership articles had provided that the parties would be partners in the trade of ship-agents, ship-brokers, and insurance-brokers. They respectively further agreed, that they would be copartners in any other business they should agree upon, and the whole was comprised in one term of seven years.

(a) 1 Swanst. 460.

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Then there was a clause for taking accounts, very similar to that in this deed; and that, upon the death of any partner, the executors should be paid according to those accounts, and bonds should be given. What happened was this: no account had been kept in the form provided by the deed; and there was a further circumstance, that they had, but in strict accordance with the provisions of the deed, entered into another business, namely, one of mercantile engagements as shippers of goods, and not merely as being ship-agents and brokers. Then, on the death of a partner, a bond was executed by the surviving partners, reciting that no account had been kept, but that they had agreed the accounts should be settled at a given sum, and they gave their bond for the payment of that sum, as the share stood, to the executors of the deceased partner. It turned out, that, after they had given this bond, disasters happened in their speculations in business; and they filed a bill to be relieved from that bond, and were relieved. Now, what Lord *Eldon* says is this: "The articles of partnership seem to refer only to the trade of ship-agents and brokers, and it is difficult to apply them to trade of another description. The question will be, whether the proceeding *de anno in annum* without settling the accounts, and the engaging in business not contemplated by the articles, are not evidence of the intention of the parties to waive the agreement? Partnership accounts may be taken in various ways; the distinction is, that, in the absence of a special agreement, the accounts must be taken in the usual way; but where a special agreement has been made, it must be abided by, provided that the parties have acted on it; if not, I always understood that the articles are read in this Court as not containing the clauses on which the parties have not acted" (a). Of course, if this clause of valuation be considered out of the deed, why then the power of expulsion must ne-

(a) 1 *Swanst.* 460.

cessarily be removed with it. "There would be no difficulty in applying the articles to the particular business with reference to which they were framed; but if the parties engaged in business in which their application would work injustice, as in importation or exportation where the returns could not be ascertained at the period limited—then, I say, that these articles, though they contain a general reference to other business, are not such as would have been prepared with relation to that specific business; and that engaging in that business affords a reason for not performing the stipulations. Considering the difficulty of now making up the account, after an interval of four or five years, I cannot, at present, think the executors of the deceased partner entitled to insist on the articles. I will read them; but, unless I intimate a change of opinion, the motion must be granted" (a). I apprehend that that case has, in this respect, a considerable bearing on the case before me; that, if you find this clause not acted upon, and therefore in a state in which it must be considered as removed from the deed, then, inasmuch as the clause of expulsion must be followed by the consequence of the partner being paid according to this valuation, it is impossible to hold that the power of expulsion can be exercised; and, therefore, I have come, I confess, to the conclusion, on that part of the case alone, that it would have been impossible to sustain this power of expulsion in the mode in which it has been exercised.

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Now, there remains the question, on which also I am of opinion with the Plaintiff,—which I said was the last point I had to consider, whether, assuming even the power of expulsion had remained, it has been so exercised in this case that the Court would give effect to this notice, and declare that the Plaintiff has ceased to be a partner. Now, this is certainly the most painful part of the whole case; and I have purposely gone, first, through that which is the more

(a) 1 Swanst. 470.

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abstract part of the case, with reference to the dry construction of law upon these articles; and I feel, in one sense, more satisfied in my own mind that I can, upon that part of the case, come to a conclusion without even the possibility of allowing one's feelings to be mixed up in any way with this extremely painful part of the investigation. I must confess, I never remember to have witnessed in this Court, among persons of the high station which these gentlemen, both Plaintiff and Defendants, have occupied in the mercantile world, a course of proceeding so extremely unsatisfactory and harsh, and so wanting, not only in regard to any consideration, but, what I think is of much more importance in this case—any fair dealing towards the party who has been expelled from this partnership. I have said before, that I hold with the Defendants, that they were competent to give a notice to dissolve without assigning any reason; that they were competent to exercise that power without holding any meeting with their copartners; but then the power must be exercised *bonâ fide*. Good faith is unquestionably of the essence of all contracts. Sir *Fitzroy Kelly* has said, that I could not introduce any new words into this contract. The Court does not do so, but the Court pre-supposes in every contract, and, if there can be a difference, more especially in every contract of partnership, a basis of good faith, upon which all the stipulations contained in the deed must rest. This power would never be allowed to be exercised by this Court in a manner against what I may call the truth and honour of these articles, borrowing an expression which has been applied to another description of contract. It is quite clear that this power was never intended to be exercised by any two thirds of the partners merely and solely for their own exclusive benefit. If cause be shewn, of course it removes all difficulty with reference to fraud, using that word according to the sense in which the Court uses it; but, if cause be not shewn and proved, then it must be very clearly made out that the exercise of the power has been in good faith.

I will put one or two illustrations to shew in what manner I conceive it to be clear the power could not have been properly exercised. I will suppose the case of a very profitable year occurring after a very disastrous one, and then the notice given by two thirds of the partners, just as the share of profits is about to be ascertained, to another partner, that he is to be expelled, and then a subsequent resolution, which they have the power of making at a meeting, appropriating his shares to themselves,—no one can contend that such an exercise of power could be upheld. Again, I will suppose this:—that this peculiar mode of undervaluing the whole of the property of the partnership in this extraordinary manner, may have continued to the very last year of the partnership,—the partnership about to dissolve,—every body aware that what had been valued at 5600*l.* was really worth 20,000*l.* I will suppose the notice to have been given just as the affair was about to be wound up; then, I think, every body will say that it would be quite impossible that a notice given under those circumstances, and with no ground assigned, could be maintained in this Court. Those are tests to shew that the literal construction of these articles cannot be enforced, although, in fact, you are not obliged to assign any particular cause for the act of expulsion. There is an expression in the Institutes with reference to this very question, of how far you may dissolve a partnership for your own benefit, which, I think, seems applicable to the consideration of this case. It is laid down thus in the Third Institute, under the title of '*De Societate*':—"At cum aliquis renunciaverit societati, solvitur societas. Sed plane si quis callide in hoc renunciaverit societati, ut obveniens aliquod lucrum solus habeat"—then the instance is given—"Veluti si totorum bonorum socius, cum ab aliquo hæres esset relictus, in hoc renunciaverit societati, ut hæreditatem solus lucri faceret: cogitur hoc lucrum communicare"(a). It must be plain, that you can neither exercise a power of this description

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(a) Inst. 3. 26. 4.

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by dissolving the partnership, nor do any other act for purposes contrary to the plain general meaning of the deed, which must be this—that this power is inserted, not for the benefit of any particular parties holding two thirds of the shares, but for the benefit of the whole society and partnership, it being considered to be an advantage to all that there should be this particular power. Now, how has it been exercised here? The circumstances are these—they are stated at full length in the evidence. I think I can give them with sufficient accuracy without referring to the statements. They are stated by the Defendants themselves to have occurred in this way:—We met together on the 26th of August, to settle the accounts. Previously to that, on the 27th of July, Mr. *Philip Henry Vaughan*, the son of the Defendant *Philip Vaughan*, had been admitted a partner into the concern. He was a young man; he had only just attained his age of twenty-one—he had been a few years before a clerk, at a salary of 150*l.* a year—he is put into a share at the price of 4500*l.*, producing him, for that year at all events, I do not know if that is a fair average of years, something over 1000*l.* for the year's income. This having been done, on the 26th of August the father thinks it desirable that his son should be also a co-manager with himself of this concern. The father, at this time, was manager with a salary of 1000*l.* a-year, and evidently managing it very much to the satisfaction of all persons concerned in the partnership. He proposes that his son should be so admitted. The Plaintiff Mr. *Blisset* objects. He objects to it on principle; that is admitted on all sides; he does not object to it on the ground of the 150*l.* a-year which is proposed to be allowed and continued to him, because Mr. *Philip Vaughan* the father says, I am willing to take that on myself. That does not appear to be the point in dispute. He says, I object to it on principle. It is further stated in the answer, that this was done in a most insolent and offensive manner. It is further stated by Mr.



*Cave* and *Mr. Daniel* senior, that they had witnessed on this and other occasions an offensive manner on the part of *Mr. Blisset* towards *Mr. Vaughan*; and *Mr. Vaughan* further says this was only the conclusion of a course of offensive and insulting treatment on the part of *Mr. Blisset*, which made it clear to his mind that he could no longer continue in the partnership with him. Well, it does not appear, and I am now taking their own statement only—I shall see presently how the evidence bears upon it; but, taking their own statement, it does not appear that any remonstrances were made, either by *Mr. Vaughan*, *Mr. Daniel*, or *Mr. Cave*, with regard to the manner in which *Mr. Blisset* had so conducted himself; but, as soon as *Mr. Blisset* had retired, *Mr. Cave* and *Mr. Vaughan* have a conversation together, and *Mr. Vaughan* states that he is extremely offended at what has taken place, and so offended that he will not remain in the partnership if *Mr. Blisset* does. Whereupon *Mr. Cave* says, “I wish we could get rid of him.” I am bound in justice to *Mr. Cave* to say that he explained this by saying, “I did not mean, and I had no wish, to get rid of him; but if the alternative were that *Mr. Blisset* or *Mr. Vaughan* must go, I should prefer getting rid of *Mr. Blisset*, and therefore I wish that we could get rid of *Mr. Blisset*; and if you *Mr. Vaughan* insist on going, and say that you will go if he does not, he must go.” That is the interpretation *Mr. Cave* gives in order to make it consistent with the subsequent letter which he wrote to *Mr. Blisset*. But this being said, *Mr. Vaughan* states that the expression of *Mr. Cave* put into his mind that which he had before utterly forgotten—the clause of expulsion. This clause, which had been a dead letter from 1823, when it was first introduced into the old articles, seems to have been totally forgotten by *Mr. Vaughan* and by *Mr. Cave*; when it suddenly flashes across *Mr. Vaughan’s* mind that there is a way of getting rid of *Mr. Blisset*, and he sends for the articles; and he and

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Mr. *Cave* look over the clause together, and thereupon no final determination, according to their account, is come to; but it is proposed that Mr. *Vaughan* shall write a letter to Mr. *Cave* and a letter to Mr. *Daniel*, stating what he had urged as to the objections to the conduct of Mr. *Blisset*, and his determination to retire from the partnership unless his conduct were altered. Now, all this having taken place, and it being arranged that such a letter should be written on the 26th of August, they do not meet again till the 29th of August. The parties were to have dined together in the interval, and Mr. *Blisset* gets a letter from Mr. *Cave*; the contents of which were, that Mr. *Vaughan* declined to meet him, as he was so offended by what had taken place that it was impossible for him to do so. Surely, there is a great deal more that Mr. *Cave* ought to have stated in that letter. Mr. *Cave* knew, at this time, of the clause of expulsion contained in the articles; he knew that Mr. *Vaughan*, when in a great state of excitement, had called this clause to his attention, and had expressed his own determination to retire unless Mr. *Blisset* were removed; he knew that he (Mr. *Cave*) had said, 'I wish we could get rid of him,' therefore, having at least a half-formed intention of expelling Mr. *Blisset*, he (Mr. *Blisset*) is not informed of anything that has been done in this respect; but having, on the 26th of August, before the conversation arose, signed those accounts that were adjusted between them—not the accounts themselves, but the sheet with reference to profit and loss—he is allowed to come to a meeting where the arrangement about finally signing the account is to take place on the 29th, without the slightest communication having been made with reference to the clause of expulsion,—much less of any intention to act upon it. Accordingly he comes on the 29th. He is then allowed to sign and definitely bind himself with reference to those accounts, and no communication whatever is made to him of any determination or notion entertained on the part

of these parties to expel him from the partnership, nor, indeed, of any serious complaint having been made by the copartners *Cave* and *Daniel* until he has done that act, and bound himself conclusively, as is supposed, by those accounts. Then, that having been done, the letter, which is an arranged letter, written to *Cave* and *Daniel*, is produced, and placed before Mr. *Blisset*. Mr. *Blisset* again states that his only object was to discuss the matter as a matter of business. He saw no reason why *Vaughan* should be so indignant at the course taken. He says, if there is anything offensive, he should be glad to have it stated; and the only answer made to him—neither *Cave* nor *Daniel* stating “We have often noticed your offensive conduct, and we concur with Mr. *Vaughan*”—all that takes place is, Mr. *Vaughan* says, “I shall get into such a state of temper, feeling as I do your conduct towards me, if I attempt to enter into this, that I would rather decline it;” and the result is, that *Cave* says to *Blisset*, “Well, *Blisset*, what is to be done?” *Blisset* says, “Done! I know nothing that is to be done;” he having not the least notion, as far as I can see, any more than *Vaughan* had a few days before, of the existence of the expulsion clause in the articles; “if Mr. *Vaughan* will retire, he must retire: I have no intention of retiring.” And he leaves the room saying, “I shall go and consult my solicitor.” That is the state of things deposed to by the Defendants; and then this is followed by the notice of expulsion sent to Mr. *Blisset*. Now, if it had rested upon that state of things alone, it strikes me that it would be impossible to uphold that notice. That power is not given for the purpose of being used for the benefit of any one partner. The power is intrusted to two thirds for the benefit of all; it ought to have been exercised for the benefit of all, and it never was intended that any one partner—for really in this case the whole has emanated from one partner, namely, Mr. *Vaughan*—it never was intended that any one partner, be-

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ing dissatisfied with the manner and conduct of another partner, if he really were so, as to which I have considerable doubt—it never was intended he should be able, behind the back of the other partner who is to be expelled, to suggest and procure, nay, almost by threats to coerce, the parties who may happen to be the holders of the other remaining shares sufficient to make up the majority of the two thirds, to concur with him in expelling that partner whom he seeks to expel. It is clear, upon all the evidence,—if I admitted the answer as conclusive evidence against themselves,—that no object was to be obtained by the partnership by expelling Mr. *Blisset*, except that Mr. *Vaughan* says “I will not remain if Mr. *Blisset* does.” So far it may be said to be an object; but Mr. *Vaughan* says, “Being the useful man, the manager, I am not going to remain if Mr. *Blisset* does.” That is the sole object that Mr. *Vaughan* suggests; there was no need of coming to a hasty conclusion upon the subject—there was time for deliberation—there was time for communicating with Mr. *Blisset*. Mr. *Vaughan* could not retire, the parties seem to have forgotten that,—without their leave; he might retire from the management, but he could not withdraw from the partnership without they gave their consent—there was ample opportunity before it could be done, although I observe Mr. *Vaughan* says in his letter to Mr. *Thomas Daniel* the younger—“We very much regret we were obliged to act, because we had not time to consult with you.” What need was there for this haste? What had Mr. *Blisset* done? Assuming their case to be correct throughout, he had merely made himself very disagreeable to Mr. *Vaughan*—surely that which had been endured for several years, according to Mr. *Vaughan*, might well be endured for a few weeks longer; but, even in that state of circumstances, the negotiating by one partner for the concurrence of his two copartners to exercise this power in the manner it has been exercised, is in itself a course of proceeding which the Court would hold

sufficient to invalidate the act, if there existed nothing else in the matter. With regard to that, I will just refer, though it is merely by way of analogy, to what was said by Sir *William Grant* in the case of *Featherstonhaugh v. Fenwick* (a), of the necessity of good faith between partners, and of avoiding all clandestine proceedings on the part of one partner in regard to another, by which any possible advantage can accrue to that other partner. The case was one of a partnership dissolvable at will by notice. The parties having a house of business, the lease of which was just expiring, Mr. *Fenwick*, a partner, goes to the lessor, and tells him he has quite made up his mind to have nothing more to do with his partner, Mr. *Featherstonhaugh*, and gets from the lessor of the premises the renewal of the lease; it is not to be done till after the dissolution; the dissolution takes place on the very day on which the lease was granted: that of course was set aside; and what Sir *William Grant* says, having a bearing on this particular branch of the case, is this: he says—"When the application was made for a renewal, no notice of dissolution had been given, nor had the Plaintiff notice of any intention of renewing the lease. It is not true, as has been represented, that the impediment to a renewal to the partnership arose solely from the indisposition of Mr. *Wilkinson* (the lessor) to any connection with the Plaintiff; as, before any objection had been made on that or any other ground, the Defendant goes with the intention and for the direct purpose of obtaining a renewal for himself and his son exclusively. He makes the application to *Murray*, who says, the proposal was for a renewal for the benefit of the Defendants, expressly excluding the Plaintiff, with whom it was represented that *George Fenwick* was determined to have no further connection in trade; and though it may be true, that *Wilkinson* afterwards said, he would not have

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granted a lease to the Defendants jointly with the Plaintiff, that declaration had become quite unnecessary by the resolution previously expressed by the Defendant, not to take a lease jointly with him. This clandestine conduct was very unfair towards the Plaintiff. The Defendants had not intimated to him that they would not have any further connection with him, and that they intended to apply for a lease on their own account. They ought first to have given him notice, and to have placed him on equal terms with them; and then, if Mr. *Wilkinson* had thought proper to give them the preference, the case might admit of a different consideration" (a).

Now, the mode in which that seems to me to apply to this case is this: it was not fair nor right—it was clandestine, I must say, on the part of Mr. *Vaughan*, to secure the ear, if I may say so, of those parties having the controlling power, as making up with himself two thirds of the partnership, and by a representation of his case, and for his own purposes,—for his own object alone,—to get them, by the threat of removing himself from the partnership, to sign this document, without the slightest communication to Mr. *Blisset*. He had no right to acquire the advantage which he does acquire by that act; he acquires the advantage of becoming the purchaser of these shares; supposing all the valuations made correctly, they were very advantageous terms; and he acquires the power of paying off a gentleman his capital of 13,000*l.* or 14,000*l.*, producing between 24 and 25 per cent. per annum, and appropriating to himself the profits which the concern was producing; and he does that by a communication behind the back of Mr. *Blisset*, when I hold it was incumbent upon him to let Mr. *Blisset* have at least an equal opportunity with himself of laying before the other partners, who held the two thirds, what

(a) 17 Ves. 311, 312.

his case was. Whether it was expedient or proper for the benefit of the partnership that he should be removed instead of Mr. *Vaughan* being removed, or whether it was necessary that either the one or the other should retire, I hold it was a point of duty, not only to Mr. *Blisset* but to Mr. *Daniel* the younger,—not that there should be a consultation in committee—I do not say that,—for, if *Cave*, *Daniel*, and *Vaughan* were all equally of one mind, that it was expedient that Mr. *Blisset* should be expelled, that would be sufficient; but, that Mr. *Vaughan*, who alone wished to get rid of Mr. *Blisset*—no other person having the slightest desire so to do—should not by these threats procure the concurrence of these two partners, and so effect that object. Upon that alone I should have held that that notice was insufficient.

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*Judgment.*

How does the case stand however with reference to the allegation of the misconduct of Mr. *Blisset*, with regard to the impossibility of conducting the business? I am bound to say that I never saw a case brought before a Court in which the Court was placed in such a painful position, having to look at the oaths of gentlemen, no doubt all of high respectability—(I have every reason to believe that to be the case)—stating that they had noticed the misconduct on the part of Mr. *Blisset* to Mr. *Vaughan*; that Mr. *Vaughan* had found it to be so offensive and objectionable in every point of view, that he could not, with any comfort to himself, continue to carry on the trade with his copartners; and then leaving it so utterly bare of evidence in every particular on their side, while the evidence is of so overwhelming a character, as far as this is concerned, on the other.

It is material to observe what took place, in considering the question whether or not this dispute has been produced by such overbearing and insulting conduct of Mr. *Blisset* to Mr. *Vaughan* as to render it impossible

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for Mr. *Vaughan*, with any comfort to himself, to carry on the transactions of the business. I actually find, that, so far from this apparently being the case, letters of the most friendly description are passing between Mr. *Vaughan* and Mr. *Blisset* down to almost, I may say, the very date of the transaction in question,—they are a series of letters which have been produced from the year 1846. It has been commented upon, that there is a gap in the year 1849; but I cannot give any weight to that, when I look at the letters which passed afterwards. I do not know what inference I am to draw from there having been any breach in their correspondence; there is no evidence of a breach in their intercourse. The letters are of this description. I do not of course go through anything but the latter part of the correspondence; but, coming down to the year 1850, there is a letter from Mr. *Vaughan*,—the gentleman who considers himself to have been so grossly insulted and ill-treated by Mr. *Blisset* as to make it almost impossible, if not quite impossible, for him to meet Mr. *Blisset* on any matters of business,—on the 19th of February, 1850, which is not so very far from the transactions in August,—beginning in this way:—"My dear *Blisset*," and inviting Mr. *Blisset* to dine with him—a thing very singular in persons so circumstanced. But we have next a letter of a much more recent date. On the 27th of July Mr. *Blisset* entirely concurs in admitting young Mr. *Vaughan* to the partnership. On the 29th of July, 1850, we find a letter—"My dear *Blisset*, I have much pleasure in accepting your kind invitation for the 9th of August." The parties were all to meet together at Mr. *Blisset's* house at dinner on the 9th of August, and those are the terms in which Mr. *Vaughan* refers to it. We find a letter of Mr. *Cave* excusing himself because he had got some engagement, and subsequently writing to say he has got rid of that engagement, and it will give him much pleasure to come and meet them—all meeting on the most amicable terms. Between the 30th of June.



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when the accounts were so made up, and August, when they were settled, as it is called, *Cave, Vaughan, and Blisset*, all go together to view the works; they travel together—they are on those terms—they must have been on the terms which partners wish to be upon, and nothing amiss is stated or even suggested as having occurred upon that journey. Then we find this letter accepting the invitation for the 9th of August, which I suppose took effect. They were actually all engaged again to meet and dine together on the 27th or 28th of August, and would have so done if it had not been for this dispute, which took place on the 26th. How is it possible for me in the face of that evidence to assume, that the conduct of Mr. *Blisset* had become such that it was impossible for Mr. *Vaughan* to carry on the business in conjunction with him as a copartner? I confess this is a part of the transaction which is extremely painful, and utterly inexplicable on the theory suggested. What did take place was this—he proposed his son as co-manager, and Mr. *Blisset* urged his objections to the son as a co-manager. It was said that such objection was so monstrous an act, and an act of such obvious ill-feeling and ill-will towards Mr. *Vaughan*, that it would of itself justify the notion entertained by Mr. *Vaughan* on this subject. I confess I was never more surprised by any argument. Here was a young man just coming of age; here was his father quite capable of managing the business; the son had only just been admitted as a partner; and though it might be very right and proper to apply for his admission, (I confess I think it was somewhat premature to apply for it); but whether it was premature or not, right or wrong, surely it was quite competent to Mr. *Blisset* in the spirit of friendship to say,—“I do not think it right, looking to all the circumstances of this case, to admit this young man into this concern as co-manager. I do not like it;” and he gave his reason, namely, that he objected to a divided responsibility,—a very natural, and it seems to me, proper reason; and yet that really, ex-

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cept what I am to infer from manner, and looks, and expression,—of which no evidence has been given, is all that is stated to have taken place. On former occasions there is no evidence given of any such expression; and there is not a word stated in the answer as to anything that Mr. *Blisset* did or said on this occasion, except the fact that it was done in an uncourteous manner. But I am bound to say, if I had not come to the conclusion, assuming all the representations of the Defendants to be correct, that this notice was not justified, being given behind the back of the other partner at the sole instance and suggestion of Mr. *Vaughan*—I could not for a moment consider, when this very case of alleged misconduct of Mr. *Blisset* is so wholly displaced by all the evidence of what took place between the parties, that the notice was anything but an act of absolute and arbitrary power on the part of the copartners, and that they were induced to commit that act, not by any benefit to be derived to the partnership in general, but solely because Mr. *Vaughan* said, “If you do not do that, then I will not continue your partner.” He obtained, therefore, an advantage behind his partner’s back, which he cannot by possibility be permitted to retain.

The only remaining point is this,—which Mr. *Malins* has suggested, that the bill ought to be dismissed upon the ground of its containing charges of fraud; and the charges are these:—It is stated in one part that “*Philip Vaughan*, being annoyed at Plaintiff’s opposition to the proposed salary to his son, conceived the design of excluding Plaintiff from the partnership, and communicated the same to the Defendants *Thomas Daniel* the elder and *William Cave*, whom he prevailed on to join in that design.” Every word of that statement is literally true, even according to the statement of the Defendants. It is true, that he was annoyed at the opposition of Mr. *Blisset*—perhaps not to the proposed salary—but annoyed at the opposition to his son’s being ad-

mitted into the management of the partnership business; and he thereupon forms that design, and communicates it to the partners. Then this passage occurs:—"The Plaintiff, not having any suspicion of the plot so formed against him." That is an expression of a strong character—it is a statement of a plot formed against him; but I confess, that a scheme which is formed for expelling a partner under a clause in a deed which the parties who are going to exercise it had totally forgotten, and which they must suppose he had forgotten too, that an invitation to attend the meeting and sign the account without any communication of that scheme so formed, does amount to a combination, which, though the word be a strong one, may well be considered as a secret contrivance, which is the proper meaning, I suppose, of the word 'plot'—a secret contrivance to the detriment and damage of the Plaintiff in the cause. Then comes a passage which is more strong. The bill charges that—"the intention of the notice of expulsion was to confiscate the Plaintiff's share;" and it charges—"That the said notice of expulsion was, under the circumstances aforesaid, fraudulent, inoperative, and void." Now, it may not have been the main intention, but one certain consequence of this act of expulsion was, to appropriate—there is never any need of using hard words, but it was to appropriate—the shares of this gentleman for the benefit of the other partners. And, in one sense, as far as obtaining the shares at a very considerable under-value is confiscation—to that it would amount. But it is charged, that it is "fraudulent, inoperative, and void." Now, I am bound to hold that this notice is void, and void upon the ground of its having been clandestinely obtained by one partner at the instance of one partner and one alone, and not having been *bonâ fide* exercised on the judgment of all the partners. I am obliged to hold it to be so, and that in this Court, whatever notions may be entertained elsewhere, is held to be, as regards that partner, a

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fraud upon him, and on that account to be void. As has been well observed during the course of the argument, the view taken by this Court with regard to morality of conduct amongst all parties—most especially amongst those who are bound by the ties of partnership—is one of the highest degree. The standard by which parties are tried here, either as trustees or as copartners, or in various other relations which may be suggested, is a standard—I am thankful to say so—far higher than the standard of the world; and, tried by that standard, I hold it to be impossible to sanction the removal of this gentleman under these circumstances. The removal of him at a time when he, as well as his copartners, may be well supposed to have been utterly ignorant of the power of such removal existing—the design of so removing him, or the least approximation to that design, not having been communicated to him—the removal having been to gratify one partner only, and not on the judgment of the other two, the other two having been induced behind his back to concur in and consent to that removal—I say, tried by the standard of this Court, such conduct must be considered, in the sense of the Court, to be a fraud upon the Plaintiff.

I have now looked upon this case as if the matter of the account were unconnected with it, and have held that it could not be supported upon the mere ground of construction, under the circumstances; but I confess it is still more painful to my mind when I look at the account. True it is, he had settled the account—true it is that he had signed the sheet which shewed the profits; but can anybody suppose, if he had been told that there was an intention of expelling him, he would have done an act which would bind him irrevocably,—that being the contention on the other side,—that he would have affixed his signature to all those various documents which he was required to sign according to the articles? Can it be doubted for one moment,—if this gentleman

had been told, "At the time you are putting your name to that document you are in effect agreeing to sell your share in this concern and all its future profits for a given sum of money, calculated upon a series of conventional valuations, which have, in truth, no reference to the real value of the property. We have formed the intention of expelling you. You are, as far as regards us, gone already from the concern;"—what his course would have been? But it is said, that the final determination to expel was not formed until after the termination of the meeting; yet all these letters had been written, and everything leading up to that had already taken place, including the expression of Mr. *Cave*, that he wished they could get rid of him.—Can any person doubt, if all these circumstances had been laid before him, this gentleman would have said, "You having given me fair notice of this, I must consider the proper course to be taken. I will not put my name to this. I will not bind myself by my signature to these accounts. I will have all my rights open to me in every way I can conceive. There must be a due and proper alteration of those accounts with regard to the altered circumstances between us." Would it have been possible for me to have held, even if I had considered the valuation so made to have been binding,—a point which I have adverted to upon the first branch of the case,—that he was now to be bound by such a signature? Yet it is insisted upon by the Defendants to the very last moment, and up to the hearing, that a valuation so made and under such circumstances, they having all the facts before them on which they were to become the purchasers, and he having none on which he was to become the seller, is conclusive. I must say I regret most deeply that this case should ever have been brought to a hearing. I regret most deeply that that intervention which was attempted by many kind friends and gentlemen, whose names are well known to most of us, stated on these pleadings and proved in evidence—attempts made to bring about a solution of these difficulties, by in-

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ducing Mr. *Vaughan* to retire from the position he had taken;—I regret that they have failed; but, as they have failed, and the matter has been brought before this Court to decide the rights of the parties, I have come to the conclusion, unquestionably to my mind, that the notice is void; and that Mr. *Blisset* did not thereupon cease to be a partner in this concern.

Now, the consequence would be, I apprehend, if the strict rights be insisted upon, that, after the exclusion, and under the circumstances of his exclusion, the Plaintiff would be entitled to have his share ascertained by a valuation, and to have this property sold. He does not express any wish to drive matters to that extremity, nor to terminate the concern, which has been going on for a hundred years in the manner in which it has hitherto been conducted, and in which, I trust, it may even still be conducted; and the *Solicitor-General*, in his reply, has referred to that passage in the answer, in which an offer is made, in the event of the notice being held to be invalid, to account for the profits of the partnership business.

The decree I therefore propose to make is—

*Decree.*  
 —

DECLARE that the notice of expulsion given to the Plaintiff on the 29th of August, 1850, was void, and that the Plaintiff did not, by virtue thereof, cease to be a partner in the copartnership firm of *John Freeman and Copper Company*, in the pleadings mentioned; the Plaintiff waiving all such relief as is sought by his bill as consequent on his exclusion by the Defendants his copartners from the said copartnership, and the Defendants having, by their answer, offered, in the event of the said notice being deemed to be invalid, to account for the share of the Plaintiff in the profits of the said copartnership business from the 30th of June, 1850—Let an account be taken on the footing of the articles of copartnership of the profits of the said copartnership from the 30th of June, 1850; and let the share of the Plaintiff in such profits be ascertained and carried to his account in the books of the said copartnership. All just allowances to be made, including the allowance to the Defendant *Philip Vaughan*, as manager. Interest to be allowed at 5*l.* per cent. on the money standing to

the credit of the Plaintiff as from the 29th of August, 1850, which was when these accounts were finally adjusted in respect of his settlement of account up to the 30th of June, 1850, and on what shall be found due for his profits in the subsequent years from the time when the respective accounts were settled by the Defendants for such years.

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*Decree.*

The counsel for the Defendants observing, that the effect of the decision of the Court was to hold that the Plaintiff was a continuing partner, inquired whether his Honour would make any regulations for the conduct of the partners with reference to the subjects in dispute; and whether the Plaintiff should not be bound by the accounts which had been settled by the partners in the interim, and which, having been settled in perfect conformity with the custom and usage of the partnership, stated the profits of the concern in each year.

The counsel for the Plaintiff observed, that the Plaintiff had never seen the accounts since the attempted expulsion.

The VICE-CHANCELLOR said, that the Plaintiff, having been excluded by the other partners, could not be bound by the accounts taken in his absence. He was entitled to an account, but there was probably little doubt that he would be willing to accept the statement of profits appearing upon the accounts, with which the other partners had been satisfied. He did not think it necessary to make any regulations for the future. It was sufficient at present to prevent the power of expulsion from being exercised in the manner in which it had been sought to exercise it. The Plaintiff must have the costs of the suit.

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July 7th,  
8th, 9th, 11th,  
12th;

Nov. 8th;

Dec. 6th.

Declaration of the trusts of the meeting houses for religious worship by the people called Methodists, and of the power of appointing preachers in such houses under the trusts thereof, in conformity with the rules and regulations of the society.

Where it appeared that the paramount object of a charitable foundation for the purposes of religious worship in a particular locality was, that it should form a branch of a certain association; and that association, subsequently, in the course of its legitimate development, became subjected to an especial form of government and discipline; and deeds had been executed by the trustees of the charity estate, soon after the time of the endowment, declaring trusts of the property, which were defective in their provisions, and also gave or reserved powers to the local trustees inconsistent with the general government and discipline of the associated body, the Court, in a suit brought a century after the date of the declaration of trust, rectified the deed, so that the estate might be held and administered in conformity with the paramount intention that the local foundation should remain connected with and form a part of the general body.

# ATTORNEY-GENERAL v. CLAPHAM.

THE information, at the relation of two members of the society of *Wesleyan Methodists* at *Birstal*, stated, that the religious body known by that appellation was begun to be formed by *John Wesley*, in 1739,—that his plan was to unite the “members” into “societies” meeting in particular localities, to appoint “ministers or preachers” in the societies, the senior being called the “assistant preacher or minister,” and “stewards” for the temporal concerns of the societies; that the “societies” were subdivided into small companies, called “classes,” the members of which were charged to promote each other’s religious edification, and one of whom was called the “class leader;” that when the societies in particular neighbourhoods were sufficiently numerous, they were divided into “circuits,” comprising the societies contiguous or conveniently accessible from each other; that “ministers or preachers” were afterwards appointed to particular circuits, who, by the direction of the “senior or assistant preacher or minister,” itinerated from place to place within the circuit, as occasion might require; that the government and direction of the entire body was originally vested in *John Wesley* exclusively, and that he appointed the ministers or preachers in the societies or circuits.

The information then stated, that, in 1744, *John Wesley* commenced the practice of summoning certain of the ministers and preachers to meet him in conference, and assist him with their advice in the exercise of his jurisdiction;



that these assemblies became annual, and were called "The yearly Conference of the people called Methodists;" and that, after its organization, *John Wesley* was accustomed to act in the exercise of his jurisdiction in accordance with the opinion of the majority so assembled; and that this was the system of the Methodists in operation in 1750.

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The information then stated, that, in or before 1750, *John Wesley*, with the assistance of his brother *Charles Wesley* and *William Grimshaw*, formed a society at *Birstal*, in the *West Riding*, which was united with certain neighbouring societies into the "*Birstal* circuit;" and that, in August, 1751, *John Wesley*, with the concurrence of the Conference, appointed *John Nelson* to be the preacher of the *Birstal* circuit; that, in or before that year, the society at *Birstal* bought a close of land there, upon which they built a tenement and offices, part of which they appropriated as a meeting-house, and the other part as a residence for their ministers or preachers, and that the purchase-money and fund for building was provided, partly by the voluntary subscriptions of the members of the society and others, and partly by money borrowed at interest upon the personal security of the persons to whom the property was conveyed as trustees (a).

The information then stated the conveyance, by indenture of bargain and sale, dated the 3rd day of December, 1751, of the premises described as the "New Meeting-house," and appurtenances, then in the tenure or occupation of *John Nelson*, to *John Rhodes* and eighteen other persons, upon trust to permit and suffer *John Wesley* and such other person and persons as he should for that purpose from time to time nominate and appoint, at all times during his life, at his will and pleasure, to have and enjoy the

(a) See the letter of *Nelson* to *Wesley*, dated in August, 1750, cited in the judgment, *infra*.

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free use and benefit of the said premises, that he *John Wesley*, and such person or persons as he should so appoint, might therein preach and expound God's holy word; and from and after his decease upon similar trusts for *Charles Wesley* and his appointees during his life; and from and after his decease upon similar trusts for *William Grimshaw* and his appointees during his life; and from and after the decease of the survivor of them, *John Wesley*, *Charles Wesley*, and *William Grimshaw*, then upon trust that the parties of the second part (the nineteen trustees to whom the property was thereby conveyed), or the major part of them, or the survivors and survivor of them, and the major part of the trustees of the said house and premises for the time being, should at all times thereafter, monthly or oftener at their discretion, nominate and appoint one or more fit person or persons to preach and expound God's holy word in the said house, in the same manner, as near as might be, as God's holy word was then preached and expounded therein; and upon further trust that when and as often as any of the said trustees for the time being should happen to die, or, other than the said trustees already appointed, should remove their or his place or places of abode or residence for the space of twelve miles or more from the said house, or should resign or give up his or their place or places, station or stations of such trustee or trustees, that then and so often, so soon afterwards as conveniently might be, the rest of the said trustees for the time being should elect and choose some other fit person or persons to be trustee or trustees to fill up such vacancies, and keep up the number of nineteen trustees; and that when and so often as the number of the trustees in whom the legal estate in the said house and premises for the time being should be vested, should be reduced to the number of five or less, that then and so often, as soon as conveniently might be after the whole number of the trustees should be filled up and made nineteen, the trustee or trustees in whom the legal estate should be, should convey and assure the said house and premises to

the use of themselves or himself, and the rest of the said trustees for the time being, and all their heirs, for ever, upon the same trusts and for the like purposes as were thereinbefore declared, and so from time to time for ever thereafter, as often as the said trustees should be reduced to the number of five or any less number, whereby the said trusts might have a perpetual duration and continuance, and might not come to and vest in the heirs of any surviving trustee: Provided always, and it was thereby declared, that every such preacher or minister, from time to time to be appointed as aforesaid, so long as he should continue in his said office, should preach or expound twice every Sunday, Christmas-day, New Year's-day, and Good Friday; to wit, in the morning and again in the evening, and once every Thursday in the evening, in or at the place aforesaid, as had been usual and customary to be done.

The information then stated the death of nine of the trustees named in the deed of 1751; the erection on the trust estate, by means of subscriptions, of a cottage, used by the stewards, class leaders, and other members of the society, as occasion required; and a conveyance, dated the 7th of May, 1782, made by the surviving trustees, of the first part; *John Wesley* and *Charles Wesley*, of the second part; and nine other persons, of the third part; whereby the parties of the first and second part conveyed the premises to the parties of the third part, to the use of the parties of the first and third parts; and that a declaration of trust, dated the 8th of May, 1782, was made between the same parties; whereby, after reciting the fact and object of the original purchase, the conveyances of 1751 and of 1782; that, by reason of the increase of members and hearers, the said preaching-house had become insufficient; and that the members of the society, as well as the parties to this declaration, had agreed to rebuild and enlarge it; and that,

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over and above the spontaneous contributions, 350*l.* would be wanted to defray the expense, and which the parties had agreed to advance upon the credit of the rents and profits to arise from the pews and seats,—It was declared, that the premises were limited to the parties of the first and third parts, as concerning the messuage or tenement, with the stable, hayloft, shed, yard, garden, croft, and other conveniences, then in the occupation of *John Shaw*, upon trust, that the trustees and the survivors of them, and the trustees for the time being to be appointed in manner hereinafter mentioned, should permit the said *John Wesley*, and such other persons as he should from time to time appoint during his natural life, to have and enjoy the free use and benefit of the said premises; that the said *John Wesley*, and such other persons as he should appoint, might therein preach and expound God's holy word, subject nevertheless to the declaration or agreement therein inserted concerning the receipt and application of the rents and profits to arise from the pews or seats in the preaching-house so to be rebuilt and enlarged as aforesaid; and after his decease, upon trust that the trustees for the time being should permit the said *Charles Wesley*, and such persons as he should from time to time appoint during his life, to have and enjoy the said premises for the purposes aforesaid, subject nevertheless to such declaration or agreement concerning the pews or seats as aforesaid; and from and immediately after the decease of the survivor of them the said *John Wesley* and *Charles Wesley*, upon trust that the trustees for the time being should from time to time, and at all times for ever thereafter, permit and suffer the said premises to be held and enjoyed for the purposes aforesaid by such persons as should successively be chosen and appointed to preach in the said house by the trustees of the said premises for the time being and such members of the said society as had been class leaders for three years at least within any of the circumjacent villages

of *Birstal, Great Gomersal, Little Gomersal, Birkenshaw, Adwalton, Drighlington, Batley, Carlinghow, and Heckmondwike*, or the major part of such trustees and class leaders. And it was thereby provided, that the said persons should preach no other doctrine than was contained in Mr. *Wesley's* notes upon the Old and New Testament; And also, that they should preach in the said house twice every Sunday, and at least one evening in every week; And also, that from and after the decease of the survivor of them the said *John Wesley* and *Charles Wesley*, every person who should be so appointed to preach in the said house should hold and enjoy the said premises, and exercise the function or office of a preacher or pastor there, only during the good will and pleasure of the major part of such trustees and class leaders as aforesaid; and that it should be lawful for the major part of such trustees and class leaders to deprive, remove, or suspend the preachers or pastors of the said society for the time being at their free will and pleasure, and to substitute and appoint other preachers or pastors in the place of him or them so deprived, removed, or suspended. And as concerning the said then lately erected house or cottage, with the appurtenances, then in the occupation of *John Hey*, upon trust, that the said trustees and the survivor of them, and the trustees for the time being, should, from time to time and at all times thereafter, permit and suffer such persons as the stewards of the said society for the time being should appoint to serve and attend the preachers or pastors of the said society, and no other persons to have and enjoy the ground rooms of or belonging to the said house or cottage. And as concerning the chamber of or belonging to the said house or cottage, upon trust, that the said trustees and the survivor of them, and the trustees for the time being, should, from time to time and at all times thereafter, permit and suffer the stewards, class leaders, and other members of the said society to have and enjoy the free use and benefit thereof, to the intent that such

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stewards might therein transact the business and concerns of or relating to the said society, and that such class leaders might therein meet their respective classes for religious conference and instruction, and that the members of the said society might there sit and remain during the intervals of preaching on the Lord's day or other days. And it was thereby further declared, that all and every the said tenements and premises were by the thereinbefore recited indenture limited in use to the trustees therein named and their heirs, upon this further trust, that they and the survivors of them, and the trustees for the time being, should, from time to time and at all times from and after the rebuilding and finishing of the said preaching-house, permit and suffer the stewards of the said society for the time being to let or demise from year to year, and no longer, all and every the pews and seats therein, for such yearly rents as to them the said stewards for the time being should appear to be reasonable, and to receive, apply, and dispose of the same rents in such manner and for such intents and purposes as thereafter was mentioned, that was to say, in the first place in repairing and supporting the said premises and all the buildings thereon erected or to be erected, and in the discharge of all taxes and rates which should be imposed on the same premises or any part thereof; And, in the next place, in payment to the said persons who had agreed to advance the said sum of 350*l.*, the amount so advanced, as therein mentioned. And, in the next place, the said stewards for the time being should pay and allow, for and towards the maintenance and support of the preachers or pastors of the said society for the time being, such an annual sum, not exceeding 10*l.* a year, as should appear to the major part of the said persons who had so as aforesaid agreed to advance and expend the said sum of 350*l.*, or of the survivors of them, to be reasonable and necessary; And after such payments as thereinbefore mentioned should respectively have been made, then the stewards of the said society for the

time being should yearly and every year pay all the rest and residue of the rents and profits which should arise from such pews and seats unto the said before-mentioned persons for and towards the repayment of the principal monies by them advanced and expended in or about the said work; all the said payments to be made rateably and in proportion to the several sums so advanced by them respectively. And, after such principal monies, with interest, should be fully satisfied and repaid, then the stewards of the said society for the time being should, from time to time and at all times, yearly and every year, pay and apply all the clear rents and profits to arise from the said pews and seats, after deducting for repairs and lasting improvements of the said premises, and all other just and necessary reprises, for and towards the maintenance and support of the preachers or pastors for the time being of the said society. And it was thereby further declared and agreed, that, from time to time and at all times, after the decease of the survivor of them the said *John Wesley* and *Charles Wesley*, the stewards of the said society should be appointed and displaced by the preachers of the said society and the trustees of the said premises for the time being, and such class leaders as aforesaid, or the major part of such preachers, trustees, and class leaders; And for the more regular appointing, displacing, suspending, or continuing of the preachers and stewards of the said society in all times coming, from and after the decease of the survivor of them the said *John Wesley* and *Charles Wesley*, it was thereby further declared and agreed, that public notice should be given of the time of holding every meeting for the purposes aforesaid, at or in the said preaching-house, on three successive Sundays, immediately after evening service there, and the same should not be held till three days after such notice given, nor at any other place than the said preaching-house. And it was thereby further declared, that all and every the said tenements and premises were, in and by the said last-recited

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indenture, limited in use to the trustees therein named, and their heirs, upon further trust, that, when and so soon as the said trustees should by death be reduced to the number of seven, then such seven surviving trustees should, within three months next after such vacancy, convey and assure the said tenements and premises, with the appurtenances, unto twelve other persons (whom they the said surviving trustees and such class leaders as aforesaid, or the major part of them, should in that behalf appoint), their heirs and assigns, to the use of such surviving trustees and such other new trustees to be appointed as aforesaid, and of their heirs and assigns for ever, upon the trusts and for the intents and purposes thereinbefore mentioned and expressed concerning the same premises respectively, and so from time to time and as often as the then present or any succeeding trustees should by death be reduced to the number of seven.

The information then stated conveyances of the 5th of December, 1809, and of the 12th of August, 1812, to trustees named *Crowther* and *Street*, of a tenement and two parcels of ground adjacent to the meeting-house, which were purchased by the society at *Birstal* for purposes corresponding with or auxiliary to those of the original foundation; and that the premises comprised in the conveyance of December, 1809, were occupied by one of the preachers or ministers of the society for the time being, with the consent of the trustees, as a residence; and that the premises comprised in the conveyance of 1812, except so much as formed the site of a school-house, which was afterwards erected thereon, was occupied in like manner, and with like consent, for residential purposes.

The information then stated two indentures of bargain and sale, dated the 22nd of January, 1818, whereby the premises comprised in the indentures of 1751, 1782, 1809,



and 1812, respectively, were expressed to be conveyed to seventeen persons as new trustees; and also a further conveyance, dated the 7th of September, 1835, describing such part of the same premises as was comprised in the deeds of 1751 and 1782 as being now in the occupation of the Rev. *H. Beech* and *J. Stocks*, and such other part as was comprised in the deeds of 1809 and 1812, as now being in the occupation of the Rev. *J. Mortimer*, and whereby the whole premises were expressed to be conveyed by the survivors of the trustees named in the conveyance of 1818 to the use of some of such survivors and of other persons, to the number of nineteen in the whole; and that, by deed dated the 8th of September, 1835, such nineteen persons and the others of the surviving parties to the preceding deeds declared the trusts to be, as to the premises mentioned to be in the several occupations of the Rev. *H. Beech* and *J. Stocks*, upon the trusts expressed in the deed of 1782; and as to the premises mentioned to be in the occupation of the Rev. *J. Mortimer*, upon trust, at all times thereafter, to permit and suffer the same to be for the habitation, use, or residence of the assistant minister or preacher who should for the time being be regularly and fairly chosen and appointed to preach and officiate in the said meeting-house by the trustees of the premises for the time being and such members of the said society called Methodists as had been class leaders for three years at least within any of the circumjacent villages therein mentioned, or the major part of such trustees and class leaders. And as to the said school-house, upon trust, at all times thereafter, to permit and suffer the same to be used, occupied, and enjoyed for the purpose of teaching and instructing therein on the Sabbath days the children of the members of the said society in and near *Birstal* as aforesaid, and such other children as should from time to time be selected for that purpose by the trustees for the time being and such class leaders as aforesaid, or the major part of such

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trustees and class leaders, by such teachers and masters as should from time to time be nominated and appointed for the purpose aforesaid by the trustees for the time being and such class leaders as aforesaid, or the major part of such trustees and class leaders. And it was thereby further declared, that the premises stated to be in the occupation of the Rev. *J. Mortimer* and the said school-house were further limited to the trustees therein named, upon such and the same trusts as were expressed or declared in and by the same indenture of the 8th of May, 1782, of or concerning the premises therein comprised, or upon and for such and so many of the same trusts as were applicable to the premises stated to be in the occupation of the said Rev. *J. Mortimer* and the said school-house, and upon no other trust whatever.

The information stated a further purchase by the trustees, and a conveyance to them of the 25th of April, 1843, of a small piece of land adjoining the other premises, upon the trusts declared by the deed of the 8th of September, 1835, or such of them as were then subsisting and applicable to the land thereby conveyed. That the purchase-money for this ground was provided by voluntary subscription and otherwise, as the purchase-money for the original property had been raised; and that the advances, mentioned in the deed of 1782, had been long since repaid, with interest.

The information then stated the deed poll of the 28th of February, 1784, executed by *John Wesley*, whereby he settled the regulations and powers of the "Conference," declaring the persons, being 100 in number, of whom it was to consist; that their meetings should be annual, and the act of the majority to be binding; that vacancies should be supplied and officers chosen by the Conference; that they might admit into or expel persons from connexion with

their body, or admit persons upon trial to be preachers and expounders of God's holy word; that they should not appoint any person to the use and enjoyment of any chapels belonging to the Methodists who was not either a member of Conference or admitted into connexion with them or upon trial, nor appoint any person for more than three years to any chapel, except ordained ministers of the Church of *England*; and that, whenever the Conference should be reduced to forty for three yearly assemblies, or should neglect to meet for three years, its powers should cease and the chapels should vest in the trustees, upon trust to appoint preachers and to use and enjoy the same as to them should seem proper. The information stated, that these regulations were assented to by the entire body of the Methodists, and had since been invariably accepted and adhered to by that body. It stated also, that the supreme government of the body had been vested in the Conference exclusively, subject to the regulations in the deed-poll, since the death of *John Wesley*, in 1791.

The information then stated the steps taken by the Conference to perfect the organisation and secure the discipline of the Methodist body:—the constitution of districts in 1791, under which the *Birstal* circuit came within the "*Leeds* district," and the settlement of the scheme of trusts for their meeting-houses and other properties, in the form expressed in the 'model deed' of the 3rd of July, 1832, the adoption of which was recommended by the Conference to the connexion at large; and by which model deed a piece of ground, intended to be the site of a meeting and dwelling-house, school-room and burial-ground, at *Halifax*, in *Yorkshire*, was conveyed to trustees, upon trusts suitable to such property belonging to Methodists, providing for the erection, repair, and rebuilding of the edifices, the appropriation of the meeting-house for the exclusive use of the ministers or preachers appointed by the Conference, and of the school-

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rooms for schools under its regulation; and containing also power for the trustees to mortgage the property,—to secure debts of the trust,—to let the pews and houses, and dispose of the graves,—receive the income,—pay the outgoings and expenses, including interest on trust debts,—and to apply the surplus towards the support of the preachers or other specified purposes beneficial to the Methodists; with provisions for the meetings of the trustees, auditing of the accounts, for sale of the trust property with consent of the Conference, and in certain cases without such consent, for the application of the proceeds for specified purposes beneficial to the body, and for the appointment of new trustees.

The information averred, that the declarations of trust of the properties acquired in 1751, 1809, and 1812, were none of them contemporaneous with the acquisition of the property; that the declaration of 1751 was originally defective; and that the lapse of time and alteration of circumstances had rendered it inappropriate; and that the declarations of 1835 and 1843 were also defective and inappropriate; that the paramount intention of the purchasers of 1751 was that the property should be held by the trustees for a meeting-house, in accordance with the constitution of Methodism; and that the paramount intention of those who acquired the other premises subsequently was, that they should be held and appropriated upon trusts ancillary to the chapel trust, and in accordance with the constitution of Methodism, having regard to the different natures of the properties. The information stated, that, with the consent of the trustees, the society at *Birstal*, and the preachers or ministers, stewards, class leaders, and other officers thereof, had always had and enjoyed the actual occupation of the premises in conformity with the original intentions and the constitution of Methodism, which had, in some respects, led to acts not apparently provided for by the declarations of trust; that it was not in accordance with the constitution of

Methodism, that the appointment or removal of the preachers or ministers of a chapel should belong to the trustees; that the entire control over the stationing and removal of preachers or ministers was inherent in the Conference; that it was not possible to obtain the services of preachers or ministers belonging to the Methodist body otherwise than in accordance with the provisions of the deed poll, and that the trustees had never appointed or removed any of such preachers or ministers.

The information stated, that in 1846 a debt of 1150*l.* was owing on the trust account in respect of so much of the cost of the purchases and buildings as had not been raised by voluntary subscription, and that the debt was in the same year increased to 1800*l.*, by the excess of expense in the rebuilding and enlargement of the chapel beyond what was raised by subscription; that the course had been to borrow this money on the promissory notes of the trustees, which were renewed and changed from time to time; and the information stated the names of the makers and payees of the existing notes, and the sums respectively due upon them.

The information, after stating a resolution which the trustees had made in 1846, for the appointment of some new trustees and the settlement of the chapel affairs upon the Conference plan, stated that there were now four vacancies in the trusteeship; that five of the Defendants—*Fawcett, Hopkinson, Livesey, Sands, and Burrell*—had ceased to be members of the Methodist body, and had joined some other religious communions; that they ought to be removed from being trustees; and that new trustees should be appointed. And the information averred that the Conference was sufficiently represented in the suit by the Defendants, the Rev. *John Scott*, the president, and the Rev. *J. Farrer*, the secretary.

The information prayed that it might be declared, that the meeting or preaching-house, chapel, lands, and pre-

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mises comprised in the deed of 1751, were acquired by the original trustees, subject to trusts appropriating the same as a place of religious worship for the people called Methodists in the connexion of the late *John Wesley*, and to be used in accordance with the religious constitution of the said people; and that it might be declared that the buildings, lands, and premises comprised in the deeds of 1809, 1812, and 1843 respectively, were acquired by the trustees subject to trusts appropriating the same for purposes corresponding with or auxiliary to the purposes for which the premises comprised in the deed of 1751 were then applicable; and that it might be declared that the deeds of 1751, 1809, 1812, and 1843, did not sufficiently declare or adequately provide for the objects of the foundations; and that the trust premises ought henceforth to be held and appropriated by the trustees thereof for the time being upon such scheme of trusts as would best effectuate the objects of the foundations, regard being had to the existing circumstances of the case. That, if the Court should think proper, the five Defendants, who had ceased to be members of the Methodist body, might be removed from being trustees, and that new trustees might be appointed to supply the existing vacancies and any other vacancies occasioned by the decree; and that, if it should appear to the Court that the 'model deed' of July, 1832, contained a fit and proper scheme of trusts for carrying the objects of the aforesaid foundations into effect, regard being had to any declarations which the Court might make on the subject, and regard being also had to the existing circumstances of the case—then, that the trust properties might be vested in the continuing and new trustees upon the trusts of the said 'model deed;' or, if the Court should not approve of the 'model deed,' then that the Court might approve and settle a scheme of trusts fit and proper for carrying the objects of the foundation into effect; and that the trust properties might be vested upon the trusts embodied in such scheme.

Mr. *Rolt* and Mr. *Little* in support of the information.

Mr. *W. M. James* appeared for the Defendants, the President and Secretary of the Conference, and the Trustees, who took the same view as the relators.

The *Solicitor-General*, Mr. *Craig*, and Mr. *Cairns* appeared for the five Defendants, *Fawcett*, *Hopkinson*, *Livesey*, *Sands*, and *Burrell*.

The case turned mainly on the effect of the existing trust deeds, with regard to the respective powers of the trustees on the one hand, and of the Conference on the other. On the part of the relators it was contended, that the authority now given to and the powers exercised by the Conference in the Methodist body, was an inevitable and legitimate development of the system, by *Wesley* himself, and was a necessary part of its present constitution; and that it was essential to the system, that the circuit preacher should be appointed by the Conference, a point for which the trust deeds did not provide, but, on the contrary, enabled the trustees to prevent.

On the part of the opposing Defendants it was contended, that the reservation to the local trustees of the power of appointing preachers was more in accordance with the spirit of Methodism, than was the assumption by the Conference of powers larger than those which they or the founder of the society originally claimed or possessed, and which powers in their nature approached those of an episcopacy. It was argued, that the claim by the Conference of an absolute and exclusive power of appointing ministers or preachers was especially an attempt at encroachment upon the just authority of the *Birstal* trustees, inasmuch as the *Birstal* society had been originally founded by *John Nelson*, whose zeal and piety, although awakened by the preaching of *Wesley*, had yet been continued and sustained without his aid; and the more so as *Wesley* himself had, in the case of

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this particular meeting-house, however reluctantly at first, yet in the end conceded to the trustees powers of which it was now attempted to divest them, and which powers, it must be assumed from his concession, he had thought not inconsistent with the system he was then creating.

The various points which were urged in the argument for and against the adoption of a new declaration of trust, and upon the settlement of the terms of the trust, so as either to preserve or extend the respective powers of the local trustees or of the Conference, and also the evidence, which was the subject of comment, will sufficiently appear in the judgment.

The works which were cited, as affording evidence or information relating to the original state of such trusts generally, and the intentions of *Wesley* with regard to them and to the foundation of the *Birstal* society and meeting-house, were the following:—*Grindrod's* Compendium of the Laws and Regulations of *Wesleyan* Methodism; *Wesley's* Life and Works; *Myles'* Chronological History of the Methodists; the Journal of Mr. *John Nelson*, Preacher of the Gospel, written by himself (*Lond.* 1851); and the Minutes of Conference.

The following cases were cited—*Attorney-General v. Murdoch* (a), *Lady Hewley's case* (b), *Attorney-General v. Wilson* (c), *Attorney-General v. Hardy* (d), and *Dr. Warren's case* (e).

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 Judgment.

VICE-CHANCELLOR:—

The principal question in this case relates to the effect to be given to a deed executed about a century ago, more

- (a) 7 Hare, 445, 465.
- (b) 9 C. & F. 380, 389.
- (c) 16 Sim. 210—224.

- (d) 1 Sim. N. S. 356, 357.
- (e) *Grindrod's* Compendium, Appendix III. p. 371.



especially with reference to that part of it which speaks of the nomination of a minister or preacher to officiate in the chapel of *Birstal*, in the county of *York*.

The question appears to be one which excited considerable attention some seventy years ago, during the lifetime of the late *Mr. Wesley*; but, through the good sense and good feeling of the community at that time, matters were so arranged, that all further controversy was at last silenced; and I think it is deeply to be regretted, that the same good sense and good feeling should not have prevailed up to the present time, so as to have prevented the necessity of any litigation in the Methodist body with reference to a question of this description at the present period. However, it becomes necessary to consider, upon the information which has now been filed, what is the true construction to be given to the original deed, and to the several other instruments which have been executed since that period with reference both to this property and to three other pieces of land which have been acquired since the date of the original instrument.

Now, the various points that are raised by the information appear to be these—First, it is contended, by the informants, that, under the circumstances of this case, a chapel having been built at *Birstal* some short time,—a year or so, before the deed of the 3rd of December, 1751, that that deed, coming subsequently to the erection of the building, ought not itself to be considered as effective in disposing of the property; and that the trusts which are therein declared are not declared by persons competent to dispose of the property in the manner in which it is there purported to be disposed of; but that the whole of the transaction must be treated as if in fact no such deed had ever existed;—that there was the simple circumstance of the property having been purchased and acquired for the benefit of the society of Methodists;—and that a scheme should now be settled for the due admin-

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istration of that trust. The same question arises with regard to the subsequently-acquired property, except as to the property purchased in 1843. Secondly, it is alleged, that the deeds which have been executed, first, do not adequately declare the trusts, even as matters stood at the date of the arrangement in question; and secondly, if they do sufficiently declare the trusts at that period, nevertheless there has been such a change of circumstances with reference to the whole body, that, looking to the general scheme and object of the parties who founded these charities, it is now necessary that the decree of this Court should establish some new regulations with regard to them. And, lastly, it is contended, that, at present at all events, the trust, with reference to the appointment of a minister, is wholly inconsistent with the general constitution of Methodism,—nearly the same point as I last referred to,—that that trust, at least, cannot prevail, and that a scheme, with reference to that portion of the trust, must be devised, in order that the general trusts may be fully and beneficially carried into effect under the direction of the Court.

The Defendants have contended, first, that the trusts were regularly created by persons competent to create them under the original deed of 1751; secondly, that the trusts are adequately expressed in that deed, or at least, if not on the face of it, that, taking into consideration the whole of the contemporaneous facts, the trusts are sufficiently ascertained, and that there is no necessity for any interference of the Court with reference to the adjustment of those trusts; and, thirdly, they contend that, whatever construction be put on the deed, the trust, at all events with reference to the appointment of the minister by the trustees, who now represent the original trustees of 1751, ought to be carried into effect in the same manner in which they were originally declared, on the ground that, at the time when this chapel was founded, (as it is expressed in the affidavits of those trustees who

take a different view from the relators), the society of Mr. Wesley, although forming one joint body under the name of "The People called Methodists," yet, nevertheless, was so arranged, that the local government, as they express it,—a term which is not very clearly defined,—was always left to the particular society itself; and that there was no interference or control on the part of the general body with reference to this local government; that, therefore, it is perfectly consistent with the object of the deed, that the trusts which were originally created should be continued, and that they should have the sole local superintendence and appointment of preachers. They say further, (and this is rather as rebutting some observations made on the part of the relators as to the impossibility of carrying this trust into effect consistently with the scheme of Methodism), that it is not inconsistent with the scheme of Methodism, and that no difficulty exists in executing the trusts as originally created; and that, in fact, there had existed, at different epochs, chapels founded on similar trusts, and with the right of nomination similarly created, and vested in trustees.

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These are the principal points that arise. There is a subordinate point raised on the part of the relators, which is this—They say that, looking at the circumstances of this case, the five dissentient trustees, who take a different view of the nature of these trusts from that taken by the relators and the majority of the trustees, should be removed from the trust, and that upon two grounds—First, that in truth they have never been properly constituted trustees, in consequence of the insertion in the deed of 1782 of a new mode of appointing trustees, which was not contained in the original deed, and which introduced new parties for their selection, and has caused the succession of trustees, if I may so term it, to have been unduly elected from time to time; and consequently, that there is a necessity for having new trustees. That will apply to all the trustees. The

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relators say, it will become necessary to appoint a wholly new set of trustees, and that those parties should be rejected who take a view adverse to the charity. Secondly, it is contended, that, even if there had been a due appointment of trustees, nevertheless, these trustees, having ceased to be members of the society, and, further than that, having now taken a view hostile to the society, and associated themselves with other bodies in opposition to it, are no longer fit persons to be continued in the trust. That is, however, a secondary part of this contest.

Now, with regard to the first point suggested by the relators, I confess I do not accede to their argument. I can understand there may be cases where a declaration of trust is purported to be made at a very long interval after the foundation of the charity, in which the Court has said that it was not competent to parties who are merely placed accidentally in the legal control of the property, or in the possession of power or authority long after the original foundation of the trust, and when its purposes must be conceived to be well settled and ascertained, to declare trusts of that property; and that the trusts would have to be ascertained by those who founded the charity, and not to be determined by the expressed intention of others who came into possession of the property long after its original foundation. But I should be carrying that principle to a dangerous extent if I were to apply it to cases of this description, where the money has been collected by the subscriptions of a variety of persons, who cannot be supposed to meet together in a body and to declare the particular objects to which this money is to be appropriated; and where almost contemporaneously with the original subscriptions and the erection of the building, the trust is declared by a number of persons who had been entrusted by those who subscribed or raised the money, and who must be taken, with the knowledge of all these parties, to have been entrusted with the legal possession of the property. It would be far too

much to hold, that those persons have not the power of expressing and declaring the will of those who so founded the charity. It would be a dangerous rule to adopt, even in a more recent case; but when I find all this has taken place a hundred years ago, when it is impossible or difficult to obtain in any case evidence of the exact circumstances that occurred at the period, it would be going far beyond any rule that has been laid down with reference to declarations of trust with regard to charities not contemporaneous with the charity itself, to say that these parties, being in possession of the property, and having power and control over it, and acting with the knowledge and consent of all interested in it, were not competent, and must not be taken, to express the will of those who so entrusted them with the management and disposition of the property itself. If, therefore, this deed had been found clearly and distinctly to express its trusts, and if those trusts were consistent with the general scope and objects of the society which founded them, I should not have thought it right in any way to interfere, simply on the ground of the deed itself having been executed a year or two after the erection of the chapel.

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I come now to what is the more important part of the question before me. I have first to ask, whether or not, on the face of the deed itself, the trusts are adequately expressed, and that without reference in the first instance to the external circumstances of the case. Now, upon that, I think there can be but one answer. It is clear that nobody, reading this deed alone, would be able to arrive at the exact purpose and object for which the charity was founded. In the first place, the deed contains no recital whatever of the parties concerned in the foundation. There is no mention of who the parties were that had taken part in the erection of this chapel. The deed only mentions the simple fact, that there is a building upon the property which has been lately erected, called the New Meeting-

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house, and which is in the occupation of one *John Nelson* (of whom we know nothing by the deed except his name); and that it is intended that some persons shall be employed to act as preachers or ministers, and who, during the life of three persons therein named, are to be appointed "to preach and expound God's holy word in the same manner, as near as may be, as it is now preached and expounded." This reference alone is sufficient to shew that the Court must look at external circumstances, and cannot arrive at the trusts from the deed itself. The Court knows nothing from the deed of who these ministers were, or how God's word was then preached and expounded. There is a further reference—"That every such preacher or minister, from time to time to be appointed as aforesaid, so long as he shall continue in his said office, shall preach or expound twice every Sunday, Christmas-day, New Year's-day, and Good Friday, to wit, in the morning and again in the evening, and once every Thursday in the evening, in or at the place aforesaid, as has been usual and customary to be done." It is perfectly clear that we must look at the surrounding circumstances, which we are entitled to do, to arrive at the mind of the founders.

I propose then, first, to look at the surrounding circumstances, in order to see how far the mind of the founders can be ascertained, and then to arrive at the question of how far the mind so expressed, and the general scope and purpose of the deed, can be carried into full and complete effect, looking at such pervading object and purport and to the change of purposes which has since taken place. That I am at liberty so to regard the matter with reference to a foundation of this description, I should not have had the least doubt, even if I wanted the confirmation of that view which I derive from the judgment of the Vice-Chancellor of *England* in *Dr. Warren's case* (a), in which I think he has clearly expressed the rule which the Court may safely adopt

(a) Grindrod's Compendium (Lond. 1850), p. 371, App. III.

for the construction of instruments of this description. He says, "It is to be observed, that the deeds of trust are not, according to my humble apprehension, to be construed merely with regard to the words that may happen to be contained in the deeds themselves, but must be construed and looked at as part and parcel of the whole machinery by which the great body of *Wesleyan* Methodists, amounting to, I believe, nearly a million of people, is kept together, and by which Methodism itself is carried on. I think I should take a very narrow view of the case, if I contented myself with merely looking at the words of the trust deed, and not going further, and considering whether, from the very nature of the transaction, and the matters connected with it, some circumstances extrinsic of the deed must not be taken into consideration (b)." He then refers to the view of Lord *Eldon* in the case of the *Duke of Bedford v. The British Museum*, as shewing that circumstances may arise which, of necessity, in some degree vary the exact expression of the deed, with reference to what must have been the implied agreement and understanding between the parties, even although one of those matters may not appear on the face of the instrument itself.

Looking, then, at the transaction in this point of view, I have to consider the exact history of the founders, if I may so term them, of this particular charity. I have come to the conclusion which I will first state, and will then briefly allude to the passages which seem to me to bear out that conclusion in the different books and documents which have been placed in evidence before me.

I have come to the conclusion, first, that this charity was founded by certain persons, who had been originally gathered together by the ministrations of *John Nelson*, some eight or nine years previously to the foundation itself; that these persons, so gathered together by *John Nelson*, had

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(a) Grindrod's Compendium (Lond. 1850), p. 373, App. III.

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been united, through his instrumentality, with a larger association which had been formed by *John Wesley*, and which has been commonly known, from his time, by the general definition of "The people called Methodists;" that considerably before the date of this deed, *John Wesley*, who originated this larger association of the whole Methodist body, had so far organised that body, that he had divided it first into small divisions called classes, each of which had a leader,—that several of these classes were formed together into what was called a Society,—and that there existed at *Birstal* a body so called, a society of "The people called Methodists," which, in fact, was the very body that had been thus gathered together by *John Nelson*, and who must be considered, as it appears to me upon the whole of this evidence, to be the founders of this particular chapel. These Societies were further organised by Mr. *Wesley*. Before the time of this foundation, several societies had been put together in a larger body, called a Circuit; and it had been the habit and custom of Mr. *Wesley* to send down,—originally, I should collect, he had taken the sole charge into his own hand,—but afterwards, with the advice and assistance,—not, as he expressly says, under the control,—but with the advice and assistance of a number of persons whom he called annually together, and whom he designated before this period "The Annual Conference,"—to every circuit, certain ministers; and those ministers or preachers had always one presiding minister or preacher, who was called the Assistant; and this assistant, with the other preachers, one or more as the case might be, who were sent down to the circuit, were the persons who alone, as it appears to me, officiated at the various chapels on the circuit, in the nature of what are called ministers, as distinguished from the persons who might occasionally preach in the particular localities, and who were afterwards called local preachers. The society at *Birstal*, some time anterior to this deed, had been united with other societies in the neighbourhood into what was



called a circuit; and, as I suppose, from being the principal place on the circuit, that society has been called the *Birstal* circuit; and to this particular circuit preachers and ministers had been sent in the manner I have described.

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I shall have then to state the evidence, upon which I have no doubt, that, in the construction of the deed, I must regard this meeting-house as having been erected for the purpose of enabling the society to meet for its devotions and its other religious exercises, in a constant state of association with the whole methodist body in the first place, and in particular association with the circuit of which it formed a part in the next place; and that the preachers or ministers were to be preachers or ministers who should not be confined in their ministrations to the particular locality at *Birstal*, but who should be preachers or ministers appointed to the circuit in the manner in which I find, anterior to the date of this deed, the ministers or preachers had always been appointed to this particular circuit; and I think it flows conclusively from the evidence in this case, that the preachers or ministers were to be of this description, as distinguished from the local preachers. I find that *John Nelson* himself, who was in possession of the meeting-house when the deed was made, afterwards did not continue to be confined to this meeting-house, but himself acted as an assistant, and went about on other circuits; among others, I find him, about this period, sent on one occasion to the *Leeds* circuit; and further than that, I do not find anywhere the term minister applied to the position of a local preacher. There is, again, this circumstance, that the deed provides for the residence of the minister. The residence which was intended for the preacher was evidently on the spot at the time, and there is no instance, that I can find, of any of the local preachers being accommodated with a residence. It is sworn in the affidavits on the part of the relators, and not contradicted by any of the affidavits that I can find on the

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part of the dissentient trustees, that no local preacher has any residence provided for him; it being the character of the local preachers that they are persons exercising their trades, but who feel themselves called upon to expound God's word, and to maintain themselves by those trades and avocations. They are strictly confined to the particular locality in which they may be placed, and are not, if I may so express it, a part of the general system by which spiritual ministrations are made to circulate throughout the whole body of the Wesleyan connexion from place to place, under the ministration of the regular preachers or regular ministers. The grounds upon which I have arrived at that conclusion are to be found in the history of this society up to the period of 1751, which is, of course, the period that I am in the first instance bound to look to.

Now I will refer first to the book called *Myles's Chronological History of Methodism*, which is propounded by the Defendants—and they therefore can scarcely object to my taking any citation from it—it is propounded by them as being a correct history of the rise and progress of Methodism. I find in it several interesting particulars not contradicted in the rest of the evidence. It is evidence put forth by those trustees who take a different view from the rest, and arrive at a different conclusion from that which the Court has arrived at. I learn (p. 14) that there is a description by *Wesley* himself of the origin of the society which he has thus established. He says—"In the latter end of the year 1739, eight or ten persons came to me in *London*, who appeared to be deeply convinced of sin and earnestly groaning for redemption." Then he proceeds to state that they met together with him, "and desired, as did two or three more, the next day, that I would spend some time with them in prayer, and advise them how to flee from the wrath to come, which they saw continually hanging over their heads. That they might have more time for

this great work, I appointed a day when they might all come together, which from thenceforward they did every week, viz on Thursday in the evening. To these, and as many more as desired to join them, (for their number increased daily), I gave that advice which I judged most useful for them, and we always concluded the meeting with prayer suited to their several necessities." Then the author here observes—"This was the rise of the Methodist Society, first in *London*, then in other places." That appears to have taken place in 1739. But, in 1742, it appears that the society had greatly increased, that they were divided into classes, and that each class consisted, as I have stated, of some twelve persons or more; and that they were committed to the care of one person, called the leader; and now, on the 15th of February, 1742, *John Wesley* himself states what occurred with reference to monies being raised by these classes; and I think it is of considerable importance in tracing the origin of the charity which is now in question. Mr. *Wesley* says—"Many were met together at *Birstal*, to consult concerning a proper method of paying the public debt contracted by building." These words shew, in the first place, that the building concern, which relates to chapels, and chapels only, was considered, so early as 1742, as something belonging to the general body of Methodists:—"It was agreed, first, that every member of the society that was able should contribute one penny per week; second, that the whole society should be divided into little classes or companies, about twelve in each class; third, that one person in each should receive the contributions of the rest, and bring it in to the stewards weekly. Thus began," says he, "that excellent institution merely upon a temporal account, from which we reaped so many spiritual blessings, that we soon fixed the same rule in all our societies." Now where the word "society" is used in the singular number, as it seems to have had a technical sense, he may be referring to the particular society at *Birstal*; but whatever might be the case, that course which

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he there pointed out, if it were with reference to a particular society or not, very soon became the practice of the general society. There very soon arose a plan of collecting weekly, from the different members in each class, their penny subscriptions, which penny subscriptions seem to have been a great instrument in the erection of all the various chapels throughout the association.

Soon after this time (February, 1742) we find the system of giving tickets commenced. That system appears to have commenced in March, 1742. The ticket has become an extremely important part of the order, if I may so call it, of Methodism, because, on the possession or non-possession of this ticket, appears to depend the title of a person to be enrolled in this body. It is stated thus in the *Chronological History*—"In this year commenced also, in *London*, the visitation of the classes once a quarter by the preachers, which gives them an opportunity of conversing four times every year with the people concerning the state of their souls, as also of ascertaining who continue to be real members, by giving to each person a ticket, with a text of Scripture on it, as a mark of their approbation. This is now universally practised, and the ticket is the same in every place. On the band tickets the letter *B.* is marked." The band was a special selection of persons, eminently distinguished for their piety, from the common class—"The increase of the societies, together with the probable supposition that improper persons would endeavour to come among them, led to this prudential measure. The following is the form of the tickets." It appears there is a text written on them, and the member, having received his ticket, is considered to be duly enrolled in his class; and the class leaders, as one finds from the subsequent rules, are directed to consider no one as belonging to the class who was not in possession of a ticket. The society, therefore, as early as 1742, nine years before the date of this deed, had acquired considerable consistency in its form; and Mr. *Wesley*, through-

out his life, evidently had for his great object the continual keeping up of this society as one united body, and the organization of a definite administration for its regulation and government. Any one will see how gradually all this arose; and when we come to 1751, the date of the deed, we shall find that the whole system of societies and circuits, and preachers travelling through the circuits, had been duly and regularly organised.

We find the first mention of *Mr. Nelson's* acquaintance with *Mr. Wesley* in a journal of *Mr. Wesley*—it occurs on the 26th of May, 1742. On that day, it is stated in the Chronological History,—and I refer to the passage in *Mr. Wesley's* journal,—that “*Mr. Wesley* visited *Birstal* in the *West Riding* of the county of *York*, where he met with a lay preacher, *Mr. John Nelson*, who was instrumental in turning many of his neighbours from darkness to light.” After some time, *Mr. Nelson*, who heartily joined *Mr. Wesley* in his work, published a journal of his travels and Christian experience,—which journal has been put in evidence in this case, and I have it here before me. Now, *Mr. Wesley* having thus seen *Nelson* in 1742, it appears quite plain from the evidence, that, from that time forward, *Mr. Nelson*, who had been first moved to consider his own conduct in life, and stirred up to preach to his neighbours, by having heard *Mr. Wesley's* powerful preaching in *London*,—not only became attached personally to *Mr. Wesley*, but he entirely united himself to him with reference to the system of Methodism; and, accordingly, we find at a very early period,—the first Conference having taken place in 1742,—we find that in 1747, which is before the date of the first indenture in question, *Mr. Nelson*, although a layman, was called in by *Mr. Wesley* to assist at the Conference that then took place in *London*. There can be no doubt that *Mr. Nelson* had associated himself, before the date of the deed of 1751, with the Methodists as a body. Further than that, we find him treated as an assistant

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throughout. We find him termed his "Son in the Gospel" That phrase Mr. *Wesley* applied to various assistants. We find him, in the subsequent year, appointed by Mr. *Wesley*, with the sanction of the Conference, to officiate, as what was then called an assistant, not in his own circuit at *Birstal*, but at *Leeds*. Therefore, as far as regards *Nelson* himself, there can be no doubt of his full and complete union with *Wesley* in all the system which he was at this time bent on establishing.

Having disposed of the exact position of *Nelson* with Mr. *Wesley*, let us proceed to consider what took place with reference to the congregation formed by Mr. *Nelson*. Now it appears, from entries in *Wesley's* journal, that *Wesley*, in the year 1747, went himself to *Birstal*; and that, by an entry in his journal of the 26th of April and the 27th of April, 1747, he makes this note—"Preached at *Birstal*, and regulated the societies." It is quite plain, therefore, that, as early as 1747, Mr. *Nelson's* congregation had been formed into what was called a society. It is further plain, that there were more societies than one, and that these societies had been regulated by Mr. *Wesley*. The next circumstance of importance which takes place is the uniting of several of these societies into circuits; and it appears by the same book (p. 45), that these circuits were first mentioned in the Conference that took place in 1746.

I ought briefly to state, with respect to the Conference, that it began by *Wesley*, in 1744, asking certain clergymen of the Church of *England* to meet him in *London* at a conference; and at that conference, after a slight discussion, they came to the conclusion, that some laymen might also be introduced, those laymen being what he called his "Sons in the Gospel," and who were to assist him in the system he then adopted. That was the origin of the Conference; and thenceforward, from time to time down to the present year, there have been assembled Conferences of preachers or ministers in this connexion.

It appears then, that, in the year 1746, the societies were united into circuits. It is mentioned in the *Chronological History* (p. 45). There seems to be a somewhat fuller report here given, in question and answer, which is the usual form of the proceedings of the Conference,—a somewhat fuller report of the proceedings than I find in the *Minutes of the Conference themselves*. The question is, “How many circuits are there? *A.* Seven: 1st. *London*, which included *Surrey* and *Kent*; 2nd. *Bristol*, which included *Somersetshire*, *Portland*, *Wiltshire*, *Oxfordshire*, and *Gloucestershire*; 3rd. *Cornwall*; 4th. *Evesham*, which included *Shrewsbury*, *Leominster*, *Hereford*, *Stroud*, and *Wednesbury*; 5th. *York*, which included *Yorkshire*, *Cheshire*, *Lancashire*, *Derbyshire*, *Nottinghamshire*, and *Lincolnshire*.” In 1746, therefore, the *Birstal* society, or those in the neighbourhood, had not become of sufficient importance to form at that time a circuit of themselves. But shortly afterwards, and before the foundation of this charity, we find that the further subdivision of circuits had taken place. I think it was in the year 1749 that the circuits became subdivided into twenty circuits. In the *Minutes of the Conference* (pp. 39-40) there is this—“How many circuits are there now? *A.* Twenty in *England*, seven in *Ireland*, two in *Scotland*, and two in *Wales*.” The various circuits are then enumerated, and the fifteenth of them is *Birstal*; and that circuit seems to have continued as a circuit from that time down to the present. This must have been the very time at which subscriptions were collected to erect the chapel.

We have, then, these several facts:—*Nelson*, who had gathered together the congregation, was attached to *Wesley* as one of his Sons in the Gospel; the congregation was formed into a *Wesleyan* society; and that society was united with several other societies into a general circuit called the *Birstal* Circuit.

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I have then to consider who are meant by Preachers or Ministers. In going through the early history of this case, it appears that Mr *Wesley*, in the first instance, associated with himself, as much as possible, clergymen of the Church of *England*. In truth, down to almost the latest period of his life,—at all events down to the period of his assuming the function himself of ordaining ministers,—Mr. *Wesley* had no intention of severing himself from the Church of *England*; but, in the most ardent and earnest manner, protested against any such severance, as being a thing to be deplored; and for some time there was a scruple even as to the employment of lay assistants. However, that scruple had been clearly overcome before the foundation of this charity; and, without going through the earlier part of the progress of Methodism, in the year 1749 a very distinct definition of what the duties of the several office bearers, if I may so describe them, in Methodism were, occurs in the Minutes of Conference (p. 39). There is an important entry in 1746. It appears that, before 1746, persons had been appointed who were called Assistants, and those assistants were the same persons as were called by Mr. *Wesley* his “Sons in the Gospel;” but, after this, they wanted further aid, and they brought in a new class of persons called Helpers, who afterwards became what were generally called the Preachers. I do not find any distinct account of the institution of helpers before 1746; but, in 1746, I find this question in the Minutes of Conference (p. 30): “What method may we use in receiving a new helper? A.—A proper time for doing this is at a Conference, after solemn fasting and prayer. We may then receive him as a probationer, by giving him the Minutes of Conference inscribed thus:—‘To A. B. You think it your duty to call sinners to repentance; make full proof hereof and we shall be glad to receive you as a fellow labourer. Observe, you are not to ramble up and down, but to go where the assistant directs, and there only.’” Tracing the rule of Method-



ism from this period downwards, you find that the persons called "Helpers" were afterwards called Preachers; that they were afterwards admitted in this form: they were first called Probationers, and, after they had gone through their probation, were admitted to be preachers, and, after they were preachers, they were appointed to various circuits to be itinerant preachers, and subject to the preachers called "Assistants." Then it is said—"Let him then read and carefully weigh what is contained therein, and see whether he can agree to it or not. If he can, let him come to the next Conference, where, after examination, fasting, and prayer, he may be received into full connexion with us, by giving him the Minutes inscribed thus:—'So long as you freely consent to and earnestly endeavour to walk by these rules, we shall rejoice to acknowledge you as a fellow labourer.'"

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In the year 1749, we find the duties of these persons very clearly defined. First, there is an important question asked in the Minutes of Conference (p. 39):—"Can there be any such thing as a general union of our societies throughout *England*?" Observe, they had been formed into circuits; but there does not appear to be any distinct connexion between circuit and circuit for bringing them into one large body. "A.—A proposal for this was made some time since. The substance of it was this:—May not all the societies in *England* be considered as one body, united by one spirit? May not that in *London*, the mother church, consult for the good of all the churches? May not the stewards of this answer letters from all parts, and give advice, at least in temporals?—Q. But how can the state of all the societies be known to the stewards in *London*? A. Very easily, by means of the assistant.—Q. Who is the assistant? A. That preacher in each circuit who is appointed from time to time to take charge of the societies and the other preachers therein." Therefore, the position of the assistant is

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very clearly and distinctly laid down, anterior to this deed, to be that of preachers on each circuit, appointed from time to time to take charge of these societies and the other preachers therein. There is another question—"What is the business of an assistant?—A. 1st. To see that the other preachers on the circuit behave well and want nothing; 2nd. To visit the classes quarterly in each place, regulate the bands, and deliver new tickets." Then there are other things, such as keeping "watch-nights and love-feasts." "4th. To take in or put out of the bands or society; 5th. To hold quarterly meetings, and therein diligently to inquire both into the spiritual and temporal state of each society; 6th. To take care that every society be duly supplied with books, and that the money for them be constantly returned; 7th. To send from every quarterly meeting a circumstantial account to *London* of every remarkable conversion, and of every one who dies in the triumph of faith; 8th. To take exact lists of the societies every *Easter*, and bring them to the next Conference; 9th. To meet the married men, the married women, the single men, and the single women, in the large societies, once a quarter; 10th. To see that every society have a private room, and a set of the library, for the helper; And 11th. To travel with me, if required, once a year through the societies in his circuit." These assistants seem to have had considerable power; but they are always under the control of Mr. *Wesley*; they are to go about to do what he had previously done himself, to regulate the societies; and quarterly meetings were appointed for this among other purposes. There is, then, a question—"But has the office of an assistant been thoroughly executed?—A. No, not by one assistant out of three. For instance, every assistant ought first to see that the other preachers behave well. But who has sent me word whether they did or not?" He complains of their not having fulfilled the various purposes he suggests.

I have, therefore, definitely the class of persons who founded this chapel, and the description of preachers sent round to those circuits, superintended by an assistant, which assistant assigned to them their several duties upon the circuit. I do not find any very distinct trace of the local preachers. They were a body, who, from the evidence given here, appear to have been persons carrying on their own trades, not undertaking the general ministry in the various chapels and places,—not called upon to attend at the meetings of Conference at any time, and not going through any of those formal admissions which we see applied to the general preachers and probationers. And we have one passage in the rules of the society, which, I think, is of some importance with reference to this duty of the ministers. The original rules seem to have been framed anterior to the calling of the first Conference. They appear to have been framed by the two *Wesleys* in conjunction, and they are stated in the *Chronological History* (p. 20). In May, 1743, the rules of the society were first published. They were published under this title—"The Nature, Design, and General Rules of the United Societies in *London, Bristol, and Newcastle-upon-Tyne, &c.*" Then, after stating the rise of the societies, there is this,—“It is the business of a leader, First, to see each person in his class once a week at the least, in order to inquire how their souls prosper” and so on; “Second, to meet the ministers and stewards of the society every week, in order to inform the minister of any that are sick, or of any that are disorderly and will not be reproved, and to pay the stewards what they have received of their several classes in the week preceding.” There you find the word “minister;” and certainly it has not been contended by any one, that those who are called local preachers performed any duties of such a description as were performed by those who are called the ministers of the society. There may be several local preachers at any one place, and there appears to

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have been no one of them who had ever had that definite position which is here described as being the officiating person of the particular society, who is to meet the parties in their classes, together with the steward of the society, according to the original rules. Those original rules, fortified as I think they are by all that took place at the subsequent meetings of Conference, clearly appear to me to shew, that I should be wrong in applying the term minister to any one else than that class of itinerant preachers who are sent about, in the manner I have described, on these various circuits, under the superintendence of one particular minister called the assistant.

Having arrived at this stage of the inquiry, and looking at all these surrounding facts which existed in 1750, there is, I think, no difficulty in construing the provisions of the deed itself. The deed speaks of there being a new preaching-house under *John Nelson*. Who was he? A person associated, as assistant preacher, with *Wesley*, and presiding over a society of *Wesley's*, which society was united with the *Birstal* circuit. Provisions are then made for the appointment of a preacher or minister,—that preacher or minister is to be first appointed by *John Wesley*, then by *Charles Wesley*, by *Grimshaw* after those two, and then (what has given rise to the controversy,) by the trustees, monthly or oftener, (I think the expression is,) as they shall think fit. Still, whoever appoints, the person is to be a preacher or minister. And, during *Wesley's* lifetime, it was quite natural to say it should be under his appointment, because, although in truth he organised this large and extensive machinery, yet it will be found repeatedly in his letters, that, down to 1784, he very vigorously controlled the whole society by his own direction, and positively refused to acknowledge that anybody had authority or control over him; and he said, that is the simple condition on which you are Methodists. “You accuse me” (he says in one of his letters) “of

being a pope, exercising arbitrary power; all I can say is, if you like me and all my plans, consent and join me; if you do not, stay away." It is thus that he asserts his own arbitrary control and authority, acting only on the advice of his Conference. That being so, one naturally expects to find *John Wesley's* name, and it will presently appear how the other names came to be associated; but, whoever the parties were who were to appoint, the preacher or minister must beyond all doubt be a preacher or minister qualified to officiate, and duly appointed to officiate within the *Birstal* circuit.

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I must not omit what has also been much relied upon, and which I think is more than is necessary for the relators in this case—the letter of *John Nelson*. I think the other facts are so clear, that the case did not require the aid of that letter. Still I should not omit noticing the remarkable letter of *Nelson* himself, which refers to the foundation of this charity. He writes, on the 29th of August, 1750, to *Wesley*, only a few months before the deed was executed, stating that—"the stewards and trustees of the chapel we are building, and which is now slated, desire you to give them advice how the writings must be made, which are to convey the power into the hands of seven men, to be as trustees, and for what use the house and ground are to be employed (a)." It appears, upon the face of that document, that the chapel had been built by persons called stewards, by persons connecting themselves with *Wesley* and *Nelson*, asking advice of himself and of *Wesley* how the matter was to be arranged. Whether they were bound strictly to follow that advice for all time might be in some sense a question, with regard to anything which did not oppose what then existed as part of the system and regulation of Methodism. That is what has constituted the principal difficulty in this case; for, up to this time, it appears to me, that *John Wesley* had personally the whole control. I do

(a) *Journal of John Nelson*, p. 208. See post, p. 620.

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not think, upon the evidence, that, at the date of the foundation of this chapel, anything definite had been provided as to how things should be carried on after the death of *John Wesley*. And therefore it might well be, that, acting on his advice, as to how the matter should be conducted during the period of his own life, they might possibly entertain a different view of how matters should be conducted after his decease, always bearing in mind, however, that the primary object was the appointment of ministers or preachers of the Methodist connexion.

What took place as to the particular form of this deed is plain, when one comes to look at the government of the society at this period, and the recommendations made from time to time by *Wesley*, with the assistance of the Conference. A question which the Conference had taken into consideration shortly before the date of this deed, was the subject of trust deeds with regard to chapels; and accordingly, in the Minutes of 1749, p. 41, this question is asked—"What do you advise with regard to public buildings? A. 1st, Let none be undertaken without the consent of the assistant. 2nd. Build, if possible, in the form of *Rotherham* House. 3rd. Settle it in the following form." Thereupon an indenture is set out, which purports to be an indenture conveying to a certain number of trustees—the number would not be considered very material—"upon special trust and confidence, and to the intent that they, and the survivors of them, and the trustees for the time being, do and shall permit *John Wesley*, late of *Lincoln* College, *Oxford*, clerk, and such other persons as he shall from time to time appoint, and at all times during his natural life, and no other persons, to have and enjoy the free use and benefit of the said premises." Then, that he (*Wesley*), and such persons as he may appoint, shall "preach and expound God's holy word." And, after his decease, there is exactly a similar trust with reference to a gentleman of the name of *William*

*Grimshaw*, a clergyman of the Church of *England*, who seems to have taken great interest in the affairs of this society. "Then upon further trust and confidence," (that is, after the decease of the survivor of the three parties), that the trustees "or the major part of them, or the survivors of them, and the major part of the trustees of the said premises for the time being, shall, from time to time and at all times for ever thereafter, permit such persons as shall be appointed at the yearly Conference of the people called Methodists in *London*, *Bristol*, or *Leeds*, and no others, to have and enjoy the said premises for the purposes aforesaid." Then there is this proviso, "Provided always, that the said persons preach no other doctrine than is contained in *Mr. Wesley's* Notes upon the New Testament and four volumes of sermons. Provided also, that they preach in the said house ——— evenings in the week, and at five o'clock on each morning following. And upon further trust and confidence"—which, upon the second branch of this case is also important—"that as often as any of these trustees, or of the trustees for the time being, shall die or cease to be a member of this society commonly called Methodists, the rest of the trustees, or of the trustees for the time being, as soon as conveniently may be, shall and may choose another trustee or trustees, in order to keep up the number of nine trustees for ever." This is the rule laid down by the Conference with reference to any future chapel that may be built. Now this particular chapel was then in the course of its erection. I do not find that this rule was altogether strictly and positively enforced, as far as I can make out, as a *sine quâ non* of Methodism at this particular epoch of 1749. No doubt it was a strong recommendation on the part of this body of what should be done after the death of the survivor of the *Wesleys* and *Grimshaw*. We find in several places, but more particularly in *Wesley's* own note to the Conference in 1766, a long statement by him of the exact relation which he conceived to be existing

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between him and the Conference; and there are subsequent letters of his scattered throughout the book, and which are not necessary to be detailed, of this description: "I always intended myself to act solely, with the advice and not under the control of the Conference." "I wished to accustom my people" (the expressions occur) "by degrees to act under the Conference after my decease." "I did not find so much difficulty with the preachers, but I always anticipated more difficulty with the laity." In fact, Mr. *Wesley* no doubt foresaw, that strong as his personal influence had been, and great as had been the commanding power of the vast talent for administration which he seems to have possessed, there would come a time when, from that innate propensity which appears to exist in the people of this country for governing themselves, there would be a difficulty in getting people to submit to any particular body, unless he had taken care to secure this object by gradual steps and gradual measures during his own lifetime. He seems to have adopted that course in this regulation. It comes forward as a distinct recommendation of what is to be done as to all chapels that should be built in future. I cannot find, from anterior circumstances, that all the provisions so recommended had at any time been strictly insisted upon as a *sine quâ non*. It is in evidence, that there were existing some deeds, although very few, giving the trustees the power of nomination. There are also several deeds requiring trustees to be members of the association.

Now, it is argued with considerable force on the part of the trustees who take a dissentient view from that of the majority,—it was put strongly by Mr. *Cairns*,—that when you look at this deed, and at *John Nelson's* letter, it is difficult to conceive that the form of the deed recommended by the Conference was not before the parties who prepared the deed of 1751; and I certainly, for my part, acquiesce in that



view. I think it almost impossible to conclude that they had not this form before them at the time the deed of 1751 was prepared, because it tallies in so many respects, although it differs in essential points. There is the appointment by this deed of *John Wesley*, *Charles Wesley*, and *Grimshaw*; and with this exception, that we find the words "no other" omitted. The circumstance of this small omission would imply that it was deliberately made. And then, further than that, we find the provision which has given rise to this suit, the appointment vested in trustees after the death of *Grimshaw*; and we find further, the omission of the clause, that the trustees must necessarily be members of the association. I cannot help, therefore, coming to the conclusion, that, when this deed was framed, although the minister must be such as I have described, and one of the itinerant, not one of the local preachers, yet the parties framing this deed did not intend to leave, after the death of the survivor of those three parties, the nomination to the Conference; but that they intended, if that could be achieved, to transfer the appointment to trustees to be nominated under this deed. The main question then will be, whether or not, taking the whole deed into consideration, and the circumstances which have since occurred, such an intention can, under the existing state of things, be carried into effect. The account that Mr. *Wesley* gave of it, when the disputes afterwards arose, which I shall advert to presently, is this:—that *Nelson*, being an ignorant man, permitted the deed to be framed in this manner. I think it is extremely probable that *Nelson*, who seems to have been a man of a deeply spiritual mind, and immersed in his spiritual calling, did not pay much attention to these temporal matters. At the same time, I must, for the reasons I stated in the outset, be of opinion, that the parties who raised the money must be taken to have selected this large body of nineteen persons, and to have entrusted them with the legal estate and authority to declare the trusts, though in such a way, of course, as to preserve the paramount object of the whole charity.

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The difficulty, then, that arises is,—what is to be done with reference to a definite and precise declaration of trust, that the trustees shall nominate and appoint one or more fit person or persons to preach, looking to the fact, that the person to be appointed must be a person itinerating, and a minister of the circuit, and must therefore be a person qualified and duly appointed to act as a minister throughout the circuit; and the conclusion I have come to is this, that although, at the time of this deed, the matter was still a question in abeyance, as to how the society would be governed and directed after Mr. *Wesley's* death, still, that the paramount intention was, that this body should be for ever associated with Methodism, so long as it continued, and should be governed and directed by the general constitution of Methodism. Now, I know that that expression, which occurs in the information (a), was discussed a good deal by the Solicitor-General in his argument; and it was contended, that there was in truth no such constitution of Methodism to be taken in that sense, by which there could be a general superintending control, but that these local bodies had their local government, and were unimpeded in respect of that local government by any central control. Now, it is satisfactory to me to find, that in the affidavit of the dissentient trustees themselves, Mr. *Fawcett* and others, they take a somewhat different view of this case. Perhaps I may say, that, in some degree, the affidavit is inconsistent with itself; for they set out with saying, that the local preachers have been the chief instruments in the Methodist connexion of acquiring and occupying the ground, and so on,—they speak of the number of local preachers, and of the local government being entrusted to the local body; but they speak also of these various societies and circuits, which is a departure from the system of mere local government. With regard to the “constitution of Methodism,” they use the ex-

(a) *Supra*, p. 552.

pression to which an objection is raised by the Solicitor-General; for, after stating the Articles of Pacification of 1795, they proceed to state the Regulations of 1797, and, in their affidavit (par. 29), I find this expression—"The general plan of pacification had not the effect of pacifying the laymen of the said connexion, but the agitation and controversy became exceedingly vigorous and alarming, until, in 1797, some of the most influential laymen of the connexion met at *Leeds*, during the sittings of the Conference, and a series of regulations were adopted, and the regulations so adopted in 1797, and the general plan of pacification before referred to, have ever since been acknowledged as having settled the constitution of Methodism." A phrase which, I think, is correctly used. Accordingly, I have something of a fixed datum, and an undisputed point between the two parties, which is this—that the constitution of Methodism is now fixed. It is fixed, say the Defendants, on the basis of the articles of 1795 and 1797. I feel myself, then, relieved from great difficulty with regard to what is, and what is not, the constitution of Methodism; and, having this mutually agreed upon having regard to that constitution of Methodism, I have no hesitation in saying, that no preacher could possibly be appointed by these trustees, who would be a local, isolated preacher, forming the chapel into a chapel of Independents, rather than a chapel of *Wesleyan* Methodists; but that the preachers to be appointed must of necessity be preachers who are in connection with the general system, who are parts and parcel of that circulating system which takes place throughout the whole course of Methodism—preachers itinerating throughout the various circuits. Looking through the history of the society, I find that, beyond all doubt, there has never been any attempt whatever on the part of any one to appoint or allocate this circulating or itinerating minister, except on the part of the Conference itself. That is a point, however, which has been disputed, and has to be in some

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degree sifted, because it is said by the Defendants, who object to this view of the trust, that the trustees have in fact appointed those preachers from time to time, and that they have appointed them at the quarterly meetings. Now the quarterly meetings are quarterly meetings of the circuit, at which are gathered together first the preachers and the assistants. There is some question whether any other parties have a right to be there unless called there; but I will assume that the trustees of all the chapels in the circuit and the leaders of every class have a right to be there. Could I, however, possibly say that an appointment made at the quarterly meeting was an appointment made by the major part of the trustees of this particular chapel, the meeting being a meeting of the preachers of the circuit, and of the assistant and trustees of all chapels within it? The trustees of this chapel might be out-voted by persons who had not the slightest connexion with the chapel in question. It would be impossible to consider an appointment made at a quarterly meeting as an appointment made by the trustees. But it is quite clear to my mind, that all that is done at these quarterly meetings is to make a general recommendation. The mode has been to select a committee of management to meet the committee of Conference, who take upon themselves the appointment of preachers. I will assume the recommendation comes direct from the Quarterly Meeting to the Conference, but still it is a recommendation only; and it is in evidence on the part of the relators, and that is not contradicted, that there have been many instances of the Conference declining to accede—no doubt in most cases they would accede—to the recommendation of the quarterly meetings. Further than this, before briefly going over the proceedings of Conference on this branch of the subject, I have to advert to very strong circumstances indicative of the difficulty felt by the trustees of this chapel with reference to this point, even as early as Mr. Wesley's own lifetime, and much more so since his decease, in the conduct they themselves have

pursued. First of all, what do I find with reference to the deed? This deed, which it was argued was in some sense all-sufficient, is found to be so defective in the view of the parties themselves, that they think it necessary to amend it by deed in the year 1782. Now, whatever observations I have made as to the rights of the parties in 1751 to declare the trust, they certainly have no bearing whatever upon the right of the parties in 1782 to alter or vary the trusts so declared. I cannot conceive, that the parties in 1782 had any right to alter the trust deed of 1751 in any matter of importance, which is in any mode inconsistent with the original trust declared of the charity. I qualify my observation, because I bear in mind the observation of the learned Lord Justice *Knight Bruce* in the case of the *Attorney-General v. Murdoch (a)*, in which he conceives it is competent to a society and its office-bearers and all interested in the land to make alterations in the trust so long as they do not alter the paramount and original trusts of the institution. Now, in this deed of 1782, it is found that there were evidently some parties besides Mr. *Wesley* dissatisfied with a mode of selecting a preacher, which would put it in the hands of the trustees of the single society of *Birstal* to appoint the minister; and accordingly we find, by the provisions of that deed, that it affects to vary the ultimate trust, by directing that, after the death of the survivor of the three gentlemen first named, a person shall be "appointed to preach in the said house by the trustees of the said premises for the time being and such members of the said society as had been class leaders for three years at least within any of the circumjacent villages of *Birstal*, *Great Gomersal*, *Little Gomersal*, *Birkenshaw*, *Adwalton*, *Drighlington*, *Batley*, *Carlinghow*, and *Heckmondwicke*, or the major part of such trustees and class leaders." I am told these are different places within the *Birstal* circuit, and that appears from the subsequent deed,

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(a) 1 De G. Mac. & G. 86, 114.

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in which, when *Heckmondwike* had ceased to be a portion of the circuit, the class leaders in that particular place were omitted. The only observation I make on this branch of the case is, that evidently the parties themselves were dissatisfied with the arrangement, and did not think it one that would secure an union with the great body of Methodists; and they were apprehensive, that, if the trustees alone should appoint, it would produce, which I believe would have been the result, a species of independency; and therefore it was necessary to associate the class leaders of the different members of the society. So matters stood in 1782, when the peculiar position of this deed of trust seems to have attracted a good deal of attention; and I use this as evidence to shew that the parties themselves to the deed were not satisfied with the provisions of the original deed. But now, in 1782, Mr. *Wesley's* attention seems to have been directed to this matter by the remarkable case of *Dewsbury*. At *Dewsbury*, the chapel having been built, even Mr. *Wesley* himself was not armed with the power to appoint a minister, but the trustees had at once appropriated to themselves the power of nominating the parties who were to preach in the chapel. Mr. *Wesley* described it as filching from him the power of nomination, and observes that they had a power of excluding him as well as other parties; and this excited attention to the other trust deeds which existed. But, in order not to go through in detail that with which every body in the case must be conversant, it appears there were various and repeated inquiries whether all the deeds were settled according to the Conference plan, and, if not, care was directed to be taken to do it, and persons were sent down to see that it was done. Mr. *Wesley*, being annoyed with the *Dewsbury* case, considered what course should be taken; and it appears, from his journals and letters, that the only course open to him was, either a suit, or the building of a new chapel. One cannot be surprised at Mr. *Wesley*, in his position, not being anxious to embark in litiga-

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tion with reference to these matters concerning the chapel. It would have been very detrimental, no doubt, to the general character of the society, that parties, instead of saying, "See how these Christians love one another," should say, "See how these Christians are disputing with each other."

In every way it was to be deprecated, independently of any question as to the probability or the improbability of the success of such an application. Therefore he said—"There is an alternative; I will build another chapel. I can build another chapel; and, although rivalry and opposition are unpleasant, yet that is the course I will take, if I am obliged to do it, with regard to *Dewsbury*;" and, as far as I can collect, that seems to have been the step taken at *Dewsbury*. At all events, the *Dewsbury* case was never brought into any course of trial. Now, the *Birstal* case was found to be in a similar position, in one sense, to *Dewsbury*; but the difficulty would not arise until after his death. This evidently gave much more time for deliberation and reflection, and then a singular course of events took place. Mr. Wesley was at *Birstal* in 1782, and they were then contemplating a change. They had to appoint new trustees, and it was necessary to have some deed. Mr. Wesley was performing duty there, and they brought him this new deed. He has left a narrative of what are called the proceedings of *Birstal*, which exactly tallies with the letter which he wrote earlier than that narrative, when the matter seems to have been fresh in his mind as to what occurred with regard to the execution by him of the deed of 1782. That letter is contained in the twelfth volume of his Correspondence, and is dated the 28th of May, 1782, the date of the deed itself being the 8th of the same month,—within three weeks: "Dear Brother, The history of the matter is this: When I was at *Dawgreen*, near *Birstal*, the trustees for *Birstal* House brought me a deed, which they read over, and desired me to sign. We disputed upon it about an hour. I then gave them a positive answer, that I would not sign it; and, leav-

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ing them abruptly, went up into my room. About noon I preached at *Horbury*. In the evening, I preached and met the society at *Wakefield*. At night, a little before I went to bed, the trustees came again, got round and worried me down. But I think they cannot worry you." I should observe here, that *Charles Wesley* is made a party to the deed, but does not execute it;—"May you not very properly write to Mr. *Valton*?" Mr. *Valton* was, at that time, the assistant of the circuit—"If the trustees will settle the *Birstal* House on the Methodist plan, I will sign their deed with all my heart; but if they build a house for a Presbyterian Meeting-house, I will not, dare not, have anything to do with it." Then the rest of the letter is immaterial to the matter in question. A further letter has been put in evidence,—a letter in *Charles Wesley's* handwriting. It may be a draft of some letter that was sent, or it may never have been sent. The only value of it is, in shewing, as far as *Charles Wesley's* views were of any importance,—and they are of some importance in the history of Methodism,—what his views were of the particular transaction in question; and it is also remarkable as shewing the extreme acuteness of *Charles Wesley's* mind, for he certainly raises every argument that has been used at the bar in favour of rectifying the deed. He had been advised to write to Mr. *Valton*, and it is addressed to somebody with reference to this subject; and he says—"The case has not been fairly represented to you. You have been informed, that, 'about thirty-one years ago, a number of poor Methodists purchased ground, and built a preaching-house.' But how? At the instance of my brother, all the Methodists of the neighbouring societies contributed to the building; and this in confidence that it would be settled on the same plan as all our preaching-houses were. 'But the founders had a right to settle it as they pleased.' True; but the trustees were not the founders, although they lent a considerable sum of money for the completing of the building, as many others



have done in all parts of England, who yet never imagined this gave them a right to appoint the preachers. 'Accordingly, they settled it'—They! I know not who; certainly not the original contributors,—'on nineteen members of the society.' And pray who could give these nineteen such a privilege over the rest? It seems to me here is no good foundation. All the society were willing my brother should name trustees; but who besides had any authority to name them I cannot understand! But, be this as it may,"—then come the objections put in—"the founders did not choose, that, after *Mr. Wesley's* death, a body of men, whom they knew not, should appoint their preachers, but the trustees.' The founders! Who were they? The 50 or 500 subscribers? These are the real founders; and nine-tenths of these did and do choose that all the travelling preachers should be appointed, not by the trustees of any particular houses, but, after *Mr. Wesley's* death, by the General Conference, that the Methodists may be one body throughout the three kingdoms." Then he enters upon that branch of the question which is the less important one.

I use these letters, it must be understood, in no way as evidence contradicting the deed. I doubt if they can be in strictness used as evidence of the circumstances under which *Mr. Wesley* executed the deed; but I think the letters are of importance as evidence of the general constitution of the body of Methodists. Upon that, I think, they are evidence; because *John Wesley* and *Charles Wesley* may be considered as the founders, and *John Wesley* as the governor of the Methodist body. It will be found, in the early part of my judgment, that I differ from *Charles Wesley* on the power of the trustees to execute the trust deed, and as to whether they may not be considered a committee of founders for the purpose. I differ from his view; but I think the use of the letters is, to shew that *Mr. Wesley* himself, in speaking of Methodism, always declares that Methodism does not

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consist in having what may be called a Presbyterian meeting-house: it is one united society. *Charles Wesley* puts that very clearly, and it is, I think, perfectly consistent with all the other circumstances of the case, and strong corroborative evidence of what the facts were as to Methodism, when he says,—“They do choose that all the travelling preachers”—clearly shewing that, in his view, travelling preachers alone were the persons intended by this deed—“that all the travelling preachers should be appointed, not by the trustees of any particular houses, but (after *Mr. Wesley’s* death) by the General Conference, that the Methodists may be one body throughout the three kingdoms.” There seems, therefore, to have been no doubt in the mind of anybody, at that time, that the preacher intended was a travelling preacher; and there is no doubt that all the founders intended that the Methodists should be one body, of which these should be an integral part. It is thus that I would use those two letters.

It is then said, that *Mr. Wesley* signed this deed. Now, *Mr. Wesley* explains, I observe, in 1782, that he had no power to alter the original deed. The deed had been framed in 1751, upon a particular trust. *Mr. Wesley* himself had no power to alter this trust; and the circumstance of his having executed the second deed really amounts to nothing more than this, that it might be made matter of evidence, as far as he was concerned, that he had no objection to the particular course which was adopted; and being used for that purpose, and as a matter of evidence only, I apprehend I am entitled to look into *John Wesley’s* letters as to what has taken place, not as evidence of the facts I have stated, but to shew *John Wesley’s* great opposition to the course taken; and certainly any use that could be made of this deed, as being evidence of his assenting to it, is entirely countervailed by that letter written three weeks afterwards, and the statement he drew up, called the statement of *Birstal House*. The only proper use of *Mr. Wesley’s*

sanction, which the Defendants could make, would be of his having agreed to the deed, as representing the whole body of the Conference, although he was not in the habit of so acting without their advice. I should hardly have thought that a deed of this description would be a deed in his legislative capacity; yet if it could be urged that he had, in his legislative capacity, sanctioned this particular form of deed of 1782 with regard to the ultimate trusts, I say that at once is answered by shewing that he, totis viribus, opposed it within three weeks after the transaction took place. The case of *Birstal* House seems to have been drawn up in 1783. It would be going too much at length to read that in extenso; it is sufficient to say, that he gives a similar detail of the circumstances; he expressed vehement opposition to the course proposed, and drew up this very case as an address to the general body of Methodists at large, in the event of this course being persisted in, saying "I am determined that there shall be no contest after my death, and we will raise by subscription another house in opposition to this very house so built," taking the course that was adopted in regard to the *Dewsbury* House. There the matter stands as far as Mr. *Wesley* is concerned: and the parties opposed to the relators are entitled to this observation, that Mr. *Wesley* was vehemently opposed to the deed; that he went down, and "found that he took nothing but his labour for his pains." The trustees never gave way, and they have contended, and do contend up to the present time, (they are entitled to the benefit of that observation,) that they have a right to exercise these privileges, and not to alter the deed.

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After this transaction of 1782, the next important event that took place was the foundation of the Conference in 1784. Now, the Conference deed of 1784 has no direct bearing, in the terms of it, on the chapel, because, as has been truly observed by the counsel for the relators, the

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deed expressly recites that the object of it was to provide an explanation of the term "Conference," which had been used in several deeds with reference to the appointment of preachers, wherein the power had been reserved to the Conference after the death of the two *Wesleys* and Mr. *Grimshaw*. As this deed was not settled on that plan, you cannot construe the words of this deed strictly, as bearing upon this particular chapel. On the other hand, there is this to be observed, that by the contest going forward on the part of Mr. *Wesley*, and his insisting either that this chapel must be reduced to the state of other chapels, or that he must build another, it is quite plain he contemplated the deed of 1784 to be the regulating deed of all chapels with which he would have any connection. Although it is not applied strictly to the terms of the particular case, it is a deed strictly appointing the form of trust deeds in future; and it is also a deed by which Mr. *Wesley* may be said to have parted with his sole controlling power and authority. He there appoints one hundred persons to form the Conference. It was found subsequently, that the number was not sufficiently large; and, although they adhered to the form in substance, other persons were admitted to vote at the Conference, although the actual members of the Conference were only one hundred in number, being one hundred senior members. That body became the regulating body with reference to all matters of the society within its proper jurisdiction.

The contest seems to have raged a little after 1784 with reference to *Birstal*, for I think the last edition of the *Birstal* case was in 1788. Mr. *Wesley*, having survived Mr. *Grimshaw* and Charles *Wesley*, died in 1791. Therefore, for forty years after the deed of 1751, there was no reason why anybody should raise a litigation with reference to this house, except with a view to have the question ultimately determined, and to avoid the litigation that

possibly might take place after Mr. *Wesley's* death. In 1791 he dies; and then arises the very difficulty which he had anticipated in his lifetime, of how far the whole community would submit to be governed by the Conference,—the question that excited considerable anxiety in his own mind before his death. He had taken several steps to bring the people gradually to the mind of uniting themselves with the Conference; but the object was not finally achieved, even by the Conference deed. In 1791 the Conference met together, and arranged for the future government of the society, in the first place, by establishing what are called districts, which was one new step taken on *Wesley's* death. As I said before, feeling some difficulty as regarded their number, they set forth a letter of *Wesley's*, written in 1785 to the Conference, and say “the Conference have unanimously resolved, that all the preachers who are in full connection with them, shall enjoy every privilege that the members of the Conference enjoy, agreeably to the above-written letter of our venerable deceased father in the gospel.” And, although they elected the 100 senior members to be members of the Conference, they seem to have admitted other members to their debates. Then, having made a declaration as to their feeling with reference to Mr. *Wesley's* death, they proceed thus—“What regulations are necessary for the preservation of our whole economy, as the Rev. Mr. *Wesley* left it? A. Let the three kingdoms be divided into districts: *Scotland* into two, and *Ireland* into six, as follows.” Then they name the districts; and the fourteenth district includes *Leeds, Sheffield, Wakefield, Birstal, Dewsbury, and Otley*. Up to this time *Birstal* had remained in connection with them. Then they say, “What directions are necessary concerning the management of the districts? A. The assistant of a circuit shall have authority to summon the preachers of his district who are in full connection on any critical case, which, according to the best of his judgment, merits such an

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interference. And the said preachers, or as many of them as can attend, shall assemble at the place appointed by the assistant aforesaid, and shall form a committee, for the purpose of determining concerning the business on which they are called. They shall choose a chairman for the occasion; and their decision shall be final until the meeting of the next Conference, when the chairman of the committee shall lay the minutes of their proceedings before the Conference." This resolution seems to have been the foundation of a good deal of heart-burning in the community at various times. The question is, whether there had not been an assumption of power in the formation of these districts, and in the calling together of these district associations by the assistant of the circuit.

There seem to have been other quarrels between the parties, as to a very important question undoubtedly; for, upon that depended the question of their ultimate severance from the Church of *England*. And one cannot help feeling, as a member of the Church of *England*, considerable regret, that so highly religious and earnest a community as that of the Methodists should, by that step, have been entirely separated from our communion. The question arose as to the administration of the Lord's Supper in various chapels; and, after considerable contest, the final result was, that in every chapel—first, only in such as wished it, for there were various temporising expedients adopted—but finally, the result was, that in every chapel the administration took place without regard to whether it was administered by an ordained minister of the Church of *England* or not. This seems to have given rise, on the part of those who were aware of Mr. Wesley's desire to remain in communion with the Church of *England*, to a good deal of opposition. It sometimes occasioned an exclusion by the trustees, of persons of different views to themselves on this subject, from their various chapels. The consequence was, that a great discussion arose as to the powers of Conference, espe-

cially as connected with trustees and with chapels. I will here take from the affidavits of Mr. *Fawcett* and others their own view of this transaction and dispute, and of what they consider to be the proper limit of the Conference power. They speak of the general assumption of ecclesiastical power, and then proceed:—"We further say that the following declaration, signed by the trustees of the charity estate, was sent by the trustees whose names appear appended thereto, in answer to an address of the trustees of *Manchester, Salford, and Stockport*, to the Methodist societies at *Birstal* and elsewhere, viz. *Birstal*, November 27th, 1794,—We have long seen with pain the proceedings of several of the preachers, who seem to mind nothing of causing divisions and contentions in the societies, in order to come at their own ends. What a pity that those who profess to fear and love God, and to be messengers of the Prince of Peace, should be the first to cause strife and divisions! We have not yet forgot the violent manner (some of these very men who have been so busy at *Birstal* lately) in which they assaulted the *Birstal* trustees some years since, and actually bought a piece of ground at a very great price, to build an opposition chapel on, and would have done it had not Mr. *Wesley* thought proper to put a stop to it. We think it high time for the trustees throughout the kingdom to unite, and, if possible, to stop the present proceedings; and, if it be thought necessary to call a general meeting of trustees at present, or at some future time, we shall appoint a delegate to represent the *Birstal* trustees. We likewise approve and adopt your four resolutions." Signed by all the trustees then present. "And we further say, that the following is a copy of the four resolutions to which the above memorial or declaration refers;" and these are very important. These resolutions were adopted, it will be observed, by the *Birstal* trustees. The trustees of the *Manchester, Salford, and Stockport* body had issued an address, in which they called

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upon the trustees generally throughout the kingdom to co-operate with their views, with reference to the transactions between themselves and the Conference. "1st. We are friends to ancient Methodism and the good old way, which has been so long approved by the Lord to the salvation of so many thousands. We are determined to afford it all the support in our power, and to suffer no innovations, without the same being first agreed upon between us and the Conference. 2nd. We are determined to do all in our power to support those preachers who maintain the discipline of old Methodism, who act agreeably to the rules of Conference and the nature of our trusts, and who are promoters of peace, and not of divisions and contentions." This is remarkable; they are going to support those preachers "who maintain the discipline of old Methodism, who act agreeably to the rules of Conference." It seems to imply that the preachers are to be governed by those rules, although they might take different views of what those rules were. "3rd. We cannot in conscience countenance or support those preachers who so glaringly divide from the rules of Conference, and that to the convulsion and division of the societies. 4th. That, as the building of chapels merely from a spirit of opposition, and without taking the steps previously necessary, according to the rule of Conference, is not only bringing a charge upon the whole connection, but also is a lasting monument of disgrace thereto, we cannot in future admit those preachers into our chapels, who thus continue to foment division by preaching in such chapels." That refers to a rule of Conference which I have not noticed, in which it is said, no new chapel shall be built until there has been time for deliberation, and it has been brought before the Conference; and the new chapels were to be built to meet cases where the parties in possession of chapels refused to act according to the principles of the whole connection. I observe, in this very statement, then, a professed adherence to all parts of the system of Metho-



dism, but they say that new preachers do not adhere to the rules of Conference and old do, and we shall give them the preference. It was a matter of contest, which was right in that view; but we have on both sides an adhesion to the rules of the Conference. Then we come to the result of all this heart-burning, which seems to be finally terminated by the articles of general pacification, which were come to by the Conference of 1795, and which, coupled with those of 1797, we have the Defendants, *Fawcett* and others, saying, form now the constitution of Methodism.

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The first set of Articles relate to the Lord's Supper; no question now arises upon that. Then concerning discipline—"The appointment of the preachers shall remain solely with the Conference, and no trustee or number of trustees shall expel or exclude from their chapel or chapels any preacher so appointed." Now that, no doubt, agrees entirely with the view I have already come to, that the itinerating preachers are invariably to be appointed, and have been always appointed, by the Conference, and they are to be so appointed. And again observe, they are called "preachers for the circuit." By preacher or minister is always meant this itinerating body. It is said, in answer to this, and which standing alone would be decisive of the case, that the same regulations provided that nothing here done—certain addenda there were afterwards—that nothing contained in these rules should be construed to violate the rights of the trustees as expressed in their respective deeds. That, no doubt, would have a considerable bearing upon the question, how far or not these rules, standing alone—if there were any other mode of selecting preachers and appointing to these chapels—would be sufficient to exclude those trustees from such mode, and I do not hesitate to say, that if there was any method of keeping up these chapels, by the appointment of a preacher selected by the trustees in connection with what I hold to be

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the clear and paramount object of the charity, itinerant preachers, they would come within that saving. But there are many other things in the trust deeds to which the saving may apply. I conceive that the trust, with reference to the necessity of a party being a member of the society, is not necessarily embodied in the trust deeds; and further, that there are several powers which are given in various trust deeds of the society,—they do not occur in this, but in later trust deeds, with reference to mortgaging, the collection of the pew-rents, and various other dealings and transactions of the society. They say, then, that nothing is to prejudice the rights claimed by the various trustees in reference to such matters as these; but if it is to be construed in the way contended for, instead of being articles of pacification, it would leave the whole at sea. The whole question was, ought the trustees or not to exclude certain preachers, holding certain views with reference to the administration of the Lord's Supper? The Conference say, "Our view is, we must, as we always have done, appoint itinerating preachers. That being so, the trustees shall not expel or exclude them from the chapel." Then there are certain provisions in case of immorality and erroneous doctrine, giving certain powers to the trustees, namely, a power of bringing the case before the Conference, always reserving the appointment of preachers to the Conference, and only giving to these parties the power of suspension until the meeting of the next Conference. And then, fourthly, there is this clause, which, in some degree, favours the contention of the defendants, that "if any trustees expel or exclude a preacher by their own separate authority from any chapel in any circuit, the chairman of the district shall summon the members of the district committee, the trustees of that circuit who have not offended, and the stewards and leaders of the circuit; and the members of such assembly shall examine into the evidence on both sides, and, if the majority of them determine that the state of the society in

which the exclusion took place requires that a new chapel should be built before the meeting of the next Conference, every proper step shall be immediately taken for erecting such chapel." One sees to what that is directed. I have read the resolution, in which the parties raising the question before the Conference said they adhered to the old mode—not to let any new chapel be built out of a spirit of opposition, or not according to the rule of Conference, and that the Conference ought to have the case brought before them. Then these rules say, if the preacher is expelled, the district committee may determine if a new chapel should be built, and may immediately and before the meeting of Conference proceed to erect a new chapel. But it may be justly said, if the trustees have no power to expel a preacher, why build a new chapel, why not assert your right? I think the answer to that is, "This is the course Mr. Wesley took." I am not sure this was not a wise course, and would not have been a wise course now, instead of raising this litigation and occasioning expense to the society. I am not sure it might not have been a wise course rather to submit to that which you are, no doubt, entitled to litigate, and to take the course pointed out by these Articles of Pacification, that, if the majority of the trustees—which has not occurred yet—resolve to exclude the preacher, you may build a new chapel for the purpose of avoiding all litigation. I think that is a reasonable interpretation to be put on the rule. It in no way necessitates the interpretation that the trustees have, in any instance, a power to expel the members. Further than that, I do not know that there is anything particular in those rules, except the rule I have called attention to already, namely, that it shall not prejudice the right of the trustees; and you then get to those in 1797, which, in connection with those of 1795, are stated on both sides to form the present constitution of Methodism.

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Now, what are the rules of 1797 with regard to this matter? Certain rules are declared with reference to the removal of leaders, stewards, and local preachers, and those are the important rules which the dissentients to the present application have in view when they say they are to be coupled with the rules of 1795. There was a great complaint of the exercise of spiritual influence in the management of temporal concerns—the office of the stewards especially—and in the removal of leaders and local preachers, who were more immediately under local superintendence perhaps than the itinerant preachers, and with regard to those parties they thought the central body was usurping too much influence. Therefore, they resolved “that no person shall be expelled for immorality until such immorality be proved to the satisfaction of a leaders’ meeting.” “In respect to the appointment and removal of leaders, stewards, and local preachers, and concerning meetings,” a regulation is set out which gives a particular mode of trying this. Then follows, “That the minutes of the last Conference, concerning the calling of meetings to consider of the affairs of the society or connexion be explained; and, as we are exceedingly desirous of preserving the peace and union of the whole body, we have agreed upon the following explanation, viz—As the leaders’ meeting is the proper meeting for the society, and the quarterly meeting for the circuit, we think that other formal meetings in general would be contrary to the Methodist economy, and very prejudicial in their consequences. But in order to be as tender as possible,”—they give leave to summon special meetings. Then they say, “we have selected all our ancient rules, which were made before the death of our late venerable father in the gospel, the Rev. Mr. Wesley, which are essential rules, or prudential at the present time, and have solemnly signed them.”

. Then comes the 7th rule:—“In respect to all new rules

which shall be made by the Conference, it is determined, that, if at any time the Conference see it necessary to make any new rule for the society at large, and such rule should be objected to at the first quarterly meeting in any given circuit, and if the major part of that meeting, in conjunction with the preachers, be of opinion that the enforcing of such rule in that circuit will be injurious to the prosperity of that circuit, it shall not be enforced in opposition to the judgment of such quarterly meeting before the second Conference. But if the rule be confirmed by the second Conference, it shall be binding on the whole connexion. Nevertheless, the quarterly meetings rejecting a new rule shall not, by publications, public meetings, or otherwise, make that rule a cause of contention."

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After the clause I have just read, it seems to be exceedingly singular that it should be contended, that the Conference has not a very large power,—it is not necessary for me to go beyond the particular case before me,—that the Conference has not a large power in making rules and regulations for controlling the society at large, and at least for controlling those very persons who, from the beginning, were always subject to their peculiar action, and the appointing and placing of these itinerant preachers in their various circuits. All parties agree, that these rules now govern this body; and I find in this rule a provision, that the Conference may make new rules governing the whole society at large; but they are not to be put in force, if objected to at a quarterly meeting, until the next meeting of Conference.

What I have stated appears to me to lead up to the conclusion, which was arrived at,—I have only been thus particular in stating it, from a peculiar bearing it has upon this case,—by much higher authority long before, I mean by the Lord Chancellor *Lyndhurst*, following in that re-

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spect the Vice-Chancellor of *England*. The Vice-Chancellor of *England* states:—"I must consider it never was intended by the parties who have continued to belong to the Methodist society in succession, since the time when it had its origin, that there should be anything else but one general object pursued, unless indeed there might be any particular bye-laws, or rules and regulations of a local kind; but that it was the object and intent of all parties concerned to form one body, to be governed by one set of laws. Although it may be perfectly true, to a certain extent, that the persons appointed trustees under the deed of 1781 might consider themselves called upon to execute their trust with regard to a certain then existing set of laws, it appears to me, that if, in the progress of time, the persons who were trustees for the time being, as successors to the first trustees under the deed of 1781, received into their chapel a person appointed by the yearly Conference to preach, they must take that person into their chapel, and deal with him, not merely on what is the general expression of the obligations of the trust deed, but according to all the rules from time to time enacted by the Conference, which, it is admitted on all hands, has been the supreme legislative and executive body since the death of Mr. *Wesley*"(a). Every word of that has a clear and distinct application to the present case. He not only holds the preachers to be the legislative body, but he says—If I find a body of trustees, with certain defined trusts in their deed as to the mode of appointing and regulating the preachers, yet if after that deed the general body of Methodists have agreed that the preachers shall be appointed or constituted in another mode, it is the duty of the trustees to follow the regulations of the general body of Conference. That observation appears to me to conclude the whole of the case, with reference to what must be done with regard to the appointment of preachers henceforth in this particular communion.

(a) Grindred's Compendium, p. 376.

Lord *Lyndhurst*, on the appeal, agrees with that view, and treats the Conference as being in that sense at least the governing body. It is not necessary for me to endeavour to raise doubts or difficulties upon other parts of the question, but for the purpose of determining who are to be the preachers in a given chapel: it appears to me throughout, that it was intended that these should be the itinerant preachers, that those preachers had been always regulated by the Conference in *Wesley's* time, and that they have been regulated by the Conference ever since; and therefore those persons, and those persons only, appointed by Conference, can be the persons to occupy the chapels.

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There are unquestionably some other strong circumstances in favour of this view. It is said, I am here asked, in 1853, to alter a deed of 1751, made more than a hundred years ago, and that, too, after a dispute about the same deed in 1782, and the successful assertion, as it is said, by the trustees of their rights, both in 1782 and ever since. Now, it is true that land has been since purchased, (which I must deal with before making my final decree), in 1809 and 1812. With regard to that land, no trust was declared at all until 1835, and with regard to that, the trustees in 1835 appear to have had some communication, so far as I can collect, made to them with reference to the wishes of the Conference, that it should be on the Conference plan. There seems to be some evidence of that, but they persisted in retaining the nomination. It is perfectly true, that on paper they did so insist, and I am not blaming them at this moment for following the words of the original deed. Any conveyancer would have told them—You must make your conveyance exactly in the form in which it appears that it was originally made. But what have been their acts? Has it been found practicable, in any way, to carry out that scheme of the trust? Why, it has been found so impracticable, that ever since the death of Mr. *Wesley*, now more than sixty

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years since, notwithstanding all this contest, notwithstanding all these views on the part of the trustees of what they ought to have done, which do not appear to be always the view of the majority of the trustees, invariably the appointments have been made by the Conference, and there has not been a single appointment according to the trust deed for sixty years. As far, therefore, as my view of the impracticability is required to be borne out by facts as to the whole body at large, including the trustees themselves, I think it is distinctly proved by the fact, that they have not attempted to make any appointment, in any other mode than by leaving it to the Conference to appoint, seeing that the immediate effect of any other appointment must have been the withdrawing of these parties out of the Conference, and therefore disturbing the whole of what I may truly call the Methodist plan.

Now it is stated, and that is the last observation I have to notice, on the part of the Defendants, that there is nothing contrary to the Methodist plan in their possession of this power; for this reason, that this is not a solitary chapel, that *Dewsbury* was in the same position, and that *Wednesbury* was in the same position or nearly so; and the cases of chapels in *London* and *Newcastle* were cited; more than all (and that certainly is the strongest instance that could be produced), there is the case of the *Bath* chapel, mentioned in Mr. *Wesley's* will. In the *Dewsbury* case, there was no appointment by the Conference. In the *Wednesbury* case, the people sent to say they objected to the Conference plan, because they were afraid of having a minister continued with them too long; and the only result was, in that case, that the Conference agreed to limit the term to three years, or even to two years. I have already dealt with the *Dewsbury* case, by saying I think it forms in itself no very strong exception, it being a matter instantly protested against by Mr. *Wesley* in every pos-



sible way. The result was, that a chapel was built, and the *Dewsbury* chapel must be taken to be excluded from the pale of Methodism. But the *Bath* case deserves more consideration. Now, in the *Bath* case it appears that Mr. *Wesley* had, in some way or other, acquired a power of appointing a committee, who were to select the persons to preach at that chapel. That would be, to a certain extent, inconsistent with the general plan of appointment by the Conference. It was left, however, in the power of *Wesley*, if he had so wished, to hand it over to the whole Conference, or to appoint—which in truth he did—a committee who should nominate the person so to preach, and in that sense take it out of the general system. This was found to be so extremely inconvenient and impracticable, that the very first thing that was done immediately after the death of Mr. *Wesley* was, that everybody so named resigned his power into the hands of the Conference. That appears in the *Chronological History* (p. 207): “We, the underwritten, being appointed by the will of the late Rev. *John Wesley* as a committee to preach in, and appoint preachers for, the new chapel in the *City-road, London*, and also the Methodist chapel in *King-street* in *Bath*, do engage, that we will use all the rights and privileges given us by Mr. *Wesley* in the present instance, in entire subservience to the Conference.” And to this all the parties so nominated by Mr. *Wesley* signed their names. The parties so named by him, I should observe, are every one of them preachers, and I believe every one of them are also assistants—Mr. *Valton’s* name is among the rest—called after the death of Mr. *Wesley* a superintendent. Unquestionably, though this seems to be in some degree an exception from the general rule, I have no clear evidence of how it originated. It might well arise from its being left by will. I have no evidence how this was done. It is stated, that, in “the will,” there is a power of doing this. If certain persons gave this chapel to the *Wesleyan* connexion, providing

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that these conditions were complied with, it might be thought expedient, in a town of the importance of *Bath*, to accept a trust of this description, and not to reject it, although it was inconsistent with the general rules of the Conference. With regard to *London*, the case appears to be clearly an exceptional case. *London* was a kind of metropolitan district, which does not seem to be regulated by the same rule of circuits and appointments as the other general chapels throughout the country. With regard to *Newcastle*, I have not been able to find the evidence upon which they proceeded. There is no statement of the origin of the trust, neither do I find any evidence of the trustees having continually exercised this power of appointment, because it seems to me perfectly impossible to conceive any mode in which the appointment could have been exercised consistently—and that is the point I have to look to—with the general construction and arrangement of Methodism. I find, with reference to the *Bath* case, that Mr. Wesley, for some reason, was willing to adopt that trust; but that the very first step taken after Mr. Wesley's death was to bring it into the general system. That seems, so far from contravening the rule laid down by the Vice-Chancellor of *England*, to adopt it. He held that it is the duty of the trustees, when there is a general recognised body, to follow the rules laid down by that body, and that they should not proceed according to the mode which the original trust directed. Thus, instead of being really exceptional, the case is one that proves the rule; for, although they had a duty thrown upon them by Mr. Wesley, yet they thought the best mode of acting up to the intention of Mr. Wesley was to throw the chapel into the general system. Those apparently exceptional cases are the only cases that create any difficulty in the way of the construction which I have throughout felt bound, by the whole confluence of authorities from first to last, to adopt.

It has been said, however, that there are local preachers and supernumerary preachers who might be appointed. I have already given my reasons why I could not construe "preacher or minister" to mean local preacher,—it appears to me, that, from the very first institution of the trusts, they were excluded. There was no instance of a local preacher occupying chapels vested in trustees. All the disputes that have arisen upon them have always arisen in respect of travelling preachers, and no question has ever arisen as to whether local preachers ought to be placed in chapels or not. Now, with respect to supernumerary preachers, it seems that they are worn out gentlemen, who appear to have deserved well at the hands of the Conference, and who are thought sufficiently able to perform occasional duties, and ought therefore to be provided for out of the funds of the society. It is idle to suppose that it was the intention of the trustees to place people of that character in this chapel; nor do I find any instance of a supernumerary preacher having been appointed specially to any particular chapel, or that, in truth, from the beginning to the end, there has been ever any other mode of appointment than that by means of selecting one of the parties named as itinerating preachers throughout the circuit.

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The Solicitor-General made one observation which I have not adverted to.—He said, that the trusts were to secure the soundness of doctrine, and that that is all which it is necessary to look to. They were to preach and expound God's word in the mode in which it had hitherto been expounded. It is sufficiently obvious, from the observations that I have made, that I cannot accede to that view; in truth, so far from this being correct, the actual doctrine seems to have been a very secondary object of Mr. Wesley. No doubt he had, as others had in the Church of England, a great tenacity for his own views of what that church

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should teach. He held that he was a member of that church, and did teach as the church taught; and it was not his notion that he was introducing a new doctrine, but that he was only enforcing more largely and vehemently the particular doctrines which he conceived to be contained in the articles of that church. His whole history abounds, from the beginning to the end, in instances of his anxious desire to keep himself in union, devoting himself only to the church as a preacher of righteousness, having a deep and earnest sense of the truths he was called upon to preach, and feeling that those with whom he was associated as clergymen had not a sufficiently lively conception of the awful truths with which they were dealing; and his object was to select and gather out of the whole body of the Church of *England* such persons as were really earnest in the matter which he had in hand, and to associate those persons in a body within the church's pale, to be governed and regulated by laws that would secure their adherence to the reality and vitality of religion, which all in common with himself professed, but which they were to exercise in a higher and more perfect manner. In fact, the great doctrine of Mr. *Wesley*, in one respect, was to lead onwards to Christian perfection. He believed, that, in making that selection, and even by subdividing and selecting again others whom he engaged in what he called "the band," he was best achieving this object. What he was founding, instead of being a sect, was much more analogous to what in another church would be called an "order." He conceived he was forming a distinct order, which was to be the subject of distinct government, but which was always to harmonize with the Church of *England*, and the regulation and government of the body was the uppermost thing in his mind, with reference to what the foundation of all these trusts was, and, even I may say in one sense, more the object of his anxiety than the formation or inculcation of any peculiar doctrinal views. It is

true, it is inserted in the deed, and perhaps it is in some respects to be regretted, that they were not to preach anything contrary to his peculiar views; for the narrowing of the largeness of Christianity will be found to be productive of more evil than benefit. Yet, unquestionably, those peculiar views he considered to be the genuine view of the Church of *England*; and I may further add, that I do not find, in any history of Methodism, general or particular, that there ever was, until the ordination of ministers, any distinct or precise objection made to them in point of doctrine,—certainly no proceeding was ever had against Mr. *Wesley* on account of his doctrines, as being doctrines which he could not hold consistently with his being a member of the Church of *England*. There may have been persons who conceived that he was erroneous in his views of doctrine; but there had been none in his lifetime who held that he was liable to be removed from his office on account of the doctrines that he held; and I fancy that a large proportion of the opposition made to him might, on examination, be found not to have arisen so much from his doctrines, as from the pureness of life, and the rigorous rule of conduct which he continually enforced, and which the world in general thought was a slur on their own practice.

Such being the general scheme, it would be monstrous, as it seems to me, looking at that deed, to hold that doctrine alone was in view; and that I must not consider that the paramount object was the continuation of a society so formed as I have described it, in one united body of Christians, never to be separated by any accidental circumstance which might take place in the subsequent development of the scheme. It was not perfectly developed, for I do not believe that there was at the time any settled scheme as to how these matters were to be carried on, or how the preachers were to be appointed after the death of Mr. *Wesley*;

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but a remedy for that defect, as it seems to me, has been fully obtained by the subsequent arrangements of 1795 and 1797, now adopted and agreed upon by all; and that remedy consists in leaving to the Conference that appointment, which by the deed as it originally stood was vested in trustees, but which it seems to me the present constitution of Methodism renders it impossible to carry into effect.

The next point to be considered is with regard to the deed of 1782. My course as to the deed of 1751 is this—I hold that the parties had a right to make the declaration of trust. I expound what I consider its meaning, and then I proceed to declare, regard being had to the present state of circumstances, how that may be carried into effect. With regard to the deed of 1782, it appears to me that nothing contrary to the provisions of the deed of 1751, holding as I do that deed to be a proper and effective deed, can be allowed to stand; and therefore I propose a declaration, which will point to all the different parts of this deed which appear to contravene the deed of 1751. The question as to what is to be done with the pew-rents does not appear to fall within that category—at least, it may be a question, and upon any questions of detail arising upon particular parts of the suit, I shall be glad to hear counsel.

As regards the land acquired in 1809 and 1812, it stands thus:—The land has been bought by the same association—the same body of people forming the society at *Birstal*; it has been annexed to the property in question, and it appears to me that it must be held upon the same trusts. There was no power in 1835 of declaring a different trust; and, after this land had been bought by the body, there was no power in any one at the end of that long interval of time to declare a different species of trust. Therefore, I must hold that those trusts, as far as they are inconsistent

with the original trusts, ought not to be followed. The same observation will apply to the deed of 1843. There is a declaration in 1843 simultaneously, that the land is bought by the same body, and that it was intended to annex it to the purposes declared in 1782. I conceive the real purposes to be those that were declared in 1751.

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There was then a matter about the schools. It was said that it was not competent to parties erecting a school, on a site where the preaching-house was to be upheld for the preacher, to declare a trust as to what should be done for the school. The school was erected in 1814, and the trusts were declared in 1835; and unless the parties are agreed about the school, it might be necessary to have some scheme directed, because it appears to me the parties were not competent in 1835 to declare the trusts of the school built in 1814. I have evidence before me of the set of rules and regulations, and there is evidence of the relators as to what was to be done with the school. I am not aware there is anything inconsistent in those rules with the declaration of trust. If so, it had better be left as it is. That disposes of the whole case as to the property in question.

Incompetency of parties to make, for the first time, an effectual declaration of charitable trusts, many years after the foundation of the charity.

There remains the question as to the trustees; and, first of all, whether any of them should be removed. Although the Conference plan in 1749 suggested that the parties should be removed if they were no longer members of the connexion, yet that was not introduced into (and I am of opinion it was purposely omitted from) the trust deed. It has not been alleged, that the omission is inconsistent with the general working of Methodism; on the contrary, there is evidence in the last affidavit filed on the part of the Defendants, that there are, I think at *Birkenhead*, other deeds in which such clauses as these do not exist, and in which Mr. *Scott*, the present president of the Conference, has

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been a party to appointing trustees who are not themselves in any way members of the Methodist connexion. I do not think, therefore, that is a ground for removing the Defendants.

Then it is said, that some of the Defendants have separated from the connexion and are hostile to it. That clearly would not be a ground for removing them if they are duly appointed trustees. If I were appointing a new body, on the ground urged by Mr. *Little* in his argument that none of these trustees were duly appointed, it might be otherwise; but I must hold these parties to be duly appointed. The point is certainly not clearly made by the information; and I should say, that, in certain parts of it, it is rather treated as if it were not intended to be raised. Some words pointing to this subject occur in different parts, but there is nothing raising the controversy so as to call the attention of these parties to it; and I cannot assume that all these persons have been unduly elected, even if elected in the mode pointed out by the deed of 1782. I find further this statement in the information:—"The trustees named in the deed of 1751, and the succeeding trustees herein mentioned, have always in law had, and now have, the possession of the trust properties; but with their consent the said society at *Birstal*, and the preachers or ministers, stewards, class leaders, and officers thereof have always had and enjoyed, and still have and enjoy, the actual occupation of the premises in the manner herein stated, and in a manner conformable to the intentions of the parties:"—it may be said, however, that, at law, there is a legal title, and that their position is different from what it would be as equitable trustees. Another paragraph (57) is more precise,—“There are at present four vacancies in the trusteeship,”—that is treating the whole body as a duly appointed body. I should not think of concluding the relators by this, if the matter had been clearly



and distinctly raised on the other paragraphs; but really the whole scheme and scope of the information seems to me to treat this body as being trustees, and to ask that they may be removed from being trustees, on the ground of their being improper persons. I do not think I have power to remove them on this account, holding them as I do to be trustees; although, if I were appointing new trustees, I should have little difficulty in saying I would not appoint those gentlemen, considering the position they now hold, as I have no doubt some of them have joined congregations opposed to the view of the present trustees.

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A reason for not appointing a person to be a trustee, may not be a ground to remove him if already appointed.

Then comes a question that has occasioned some difficulty—What is to be done with regard to these gentlemen, and with regard to their costs which have been incurred in the course of this litigation? Unquestionably, it seems to me to be a very unfortunate thing that this litigation should have been thought necessary at the present moment. I entirely concur, in the first instance, with the observation with which Lord *Lyndhurst* prefaces his judgment in *Dr. Warren's case*, where he says, "I trust I may be permitted to express my regret, that, in a society so constituted, for such objects, with such motives, and with such feelings, dissensions of this description should have been introduced; and I must suggest whether it would not be advisable to make some endeavour, for the interests of the society, by some attempt towards accommodation, to put an end to those dissensions which have given rise to the present proceedings" (a). In every word of that I entirely concur. In the present instance, it is very remarkable that the trustees are ten in number against five, and that for sixty years the nomination has gone on exactly in the way the relators wish. I really do not understand,

(a) Grindrod's Compendium, p. 394.

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except that it has arisen from the existing contest in the Methodist body with what is called the Reforming Methodists,—I really cannot see—what necessity there was for coming to the Court at the present moment to aid these ten trustees. They might clearly, by electing new trustees under the trust deed, have increased their majority by filling up the vacancies, so as to make themselves fourteen out of nineteen. I say I cannot see what necessity there was for making this application to the Court, and I am obliged to ask, on the question of the costs—Have the Defendants occasioned the litigation? I cannot find that they have. It would appear that they have rather been dragged into the litigation than in any way occasioned it. For sixty years there has been no attempt to appoint. There has been a strenuous refusal to execute any other trust deed; but I cannot hold that is a breach of trust in a trustee. Finding that a trust exists in the deed, without any declaration by this Court of the necessity of making an alteration in it, I cannot blame a trustee for taking care to have his conveyance made to him in that usual form.

[Mr. *Little*, on behalf of the relators, referred to that part of the information which set forth the resolution come to for the building of the chapel in 1835, that it should be settled according to the Conference plan; and observed, that the relators considered the trustees were so favourable to the information, that there was a pledge on the part of the trustees to promote, with the sanction of the society, the settlement of the chapel on the Conference plan; that the trustees on the opposite side were parties to the resolution; and that the relators conceived, when they made them parties to the information, that they were acting in good faith, and performing the obligation binding on both parties; that the information was not framed in a hostile spirit to them, but was framed simply to carry out the arrangement. And therefore,

that the meetings of the trustees in which the dissentients had claimed a right to exclude Conference ministers had not been brought forward by the information.]

VICE-CHANCELLOR.—I am glad that Mr. *Little* has called my attention to those circumstances, for it certainly removes the impression that I was under, of there having been a certain degree of haste in these parties, who have at this moment everything in their own hands and the power of further strengthening themselves, in applying to this Court. However, it appears, that the question was likely to be raised, that the five dissentient trustees evinced their intention to raise it as far as (being in a minority) they could have an opportunity of raising it. That was their view, and so far, in a certain sense, this information would be necessary. But still I have to consider the question, whether or not, in truth, I can visit the trustees with costs, for it really comes to that, for insisting upon the trusts of a deed being literally carried into effect, to which trust they have succeeded in regular rotation. It would be extremely hard to say that they have not a right to raise that question. I confess I do not affect to have any doubt in my own mind. I do not intend to weaken anything that I have said, by throwing out any suggestion, that there is a doubt on my mind upon the true construction of this deed, and on that which ought to be the future mode of arranging the affairs of the charity; but it is a different thing, after having had the benefit of hearing the question fully argued by counsel on both sides, and all the materials placed before me for arriving at that conclusion, to say that I can visit with or even deprive of costs, gentlemen who come here and rest upon the literal construction of the deed,—who say ‘the whole thing can be effected by the deed by which we are regulated; and we come here with the impression that we are able so to do,

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and that we have a right to have it so construed.' No doubt there are or may be other motives and other views in operation in the minds of these gentlemen; but I think I should act very wrong if I were to allow myself to be influenced, on a question of costs, by the motives which induced these parties to stand on their strict legal rights. I cannot help thinking, that any person appointed to the situation of trustee must have a right to say, "I stand upon the literal construction of the deed; I am arguing upon that literal construction;" and more especially in this case, as it is not a construction set up for the first time;—it is a construction that has been set up and insisted upon by some of their predecessors from 1782 down to 1835, when they were appointed. There have always been persons who entertained these views, even before these unfortunate reform disputes had arisen. Even in the time of *Wesley* himself, and in the presence of their great founder, there were persons who maintained that this was the right construction; and, looking to what is the literal effect of the deed, it is difficult for me to say, they have not a right to have it sifted and argued. The consequence, no doubt, is most unfortunate to the particular charity. I am afraid, if I give them their costs, they must have their full costs of trustees as between solicitor and client, and it will so far diminish the funds of this society,—a consequence that Mr. *Wesley* probably, as well for Christian peace as for other reasons, was desirous to avoid, when he thought the building of another chapel might be the preferable course to adopt.

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The cause was spoken to on the Minutes; and, after a discussion on the form of the order, it was ultimately settled as follows:—

1. It appearing to the Court, that, at the date of the indenture of the 3rd day of December, 1751, in the information filed in this cause mentioned, the building called "The New Meeting House" therein mentioned, situate at *Birstal* in the county of *York*, was erected by and for the use of the society originally formed under the ministry of *John Nelson* in the said information mentioned; and that, at the date of the said indenture, such society had been united to and formed part of a larger association organised by the Rev. *John Wesley*, and by him styled "The people called Methodists;" and that such larger association consisted of societies, several of which were respectively united together in circuits; and that, for each of such circuits, travelling preachers were from time to time appointed to minister in the chapels of the circuit by the said *John Wesley*, with the advice of certain preachers called together by him to a yearly Conference, one of which preachers was styled "The Assistant," and was appointed to take charge of the societies in the circuit and of the other preachers therein, and that such travelling preachers alone performed the regular ministrations and services in the several chapels of the circuit; and it further appearing, that, at the date of the said indenture, the said society at *Birstal* was united with several other societies in a circuit called the *Birstal* circuit. 2. This Court doth declare, that the said meeting-house or chapel and premises in the said indenture mentioned, were intended and ought at all times to be used, occupied, and enjoyed as a place of religious worship for the said society at *Birstal* of "the said people called Methodists," and for such other services and meetings as may be duly held therein, in accordance with the rules and regulations of the said people called Methodists. 3. And doth declare, that, according to the true intent and meaning of the said indenture, the preacher or minister therein referred to and directed to be appointed as therein mentioned, was intended to be and ought at all times to be one of the preachers of the circuit of which the said society at *Birstal* may form part. 4. And it further appearing to the Court, that the said circuit preachers, and in particular those of the *Birstal* circuit, were, at and before the date of the said indenture and at all times thereafter during the lifetime of the said *John Wesley*, appointed either by the said *John Wesley* with the advice of the said Conference, or by the said Conference presided over by the said *John Wesley*; and that during the lifetime of the said *John Wesley* the members of such Conference were defined, and the mode of continuing

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the same regulated by a certain deed-poll, dated the 28th day of February, 1784; and that, since the death of the said *John Wesley*, the appointment of all the circuit preachers, and in particular of the preachers in the said *Birstal* circuit has been made, and that, according to the rules and regulations of "the said people called Methodists," such appointment ought to be made by the said Conference only. 5. This Court doth declare, that the trusts contained in the said indenture, with reference to the appointment of a preacher in the said chapel, after the decease of the survivor of *John Wesley*, *Charles Wesley*, and *William Grimshaw*, therein mentioned, by the major part of the trustees for the time being of the said indenture, cannot be carried into effect consistently with the due appointment of such preacher or minister as by the said indenture was intended to be provided for the said chapel; and that the said trust premises ought at all times to be held by the trustees for the time being, acting under the said indenture, upon trust to permit and suffer such persons, being preachers or ministers of the *Birstal* circuit, or of the circuit of which the said society at *Birstal* may for the time being form part, as shall from time to time be duly appointed by the said Conference for that purpose, to have and enjoy the free use and benefit of the said trust premises in accordance with the trusts hereby declared; and also to permit such services and meetings to be performed and held therein, and by such person or persons, and in such manner as shall be in accordance with the rules and regulations of "the said people called Methodists." 6. And doth declare, that the indenture of the 8th day of May, 1782, in the said information mentioned, so far as it purports in any way to vary the trusts in the said indenture of the 3rd day of December, 1751, contained, with reference to the nomination and appointment of trustees under such indenture, or with reference to the nomination and appointment of a minister or preacher, and so far as it purports to confer on the persons therein named or described the power of removing or suspending any preacher or minister, or otherwise to subject the premises therein comprised to any trusts which are inconsistent with the rules and regulations of the said people called Methodists, is void and of no effect. 7. And doth declare, that the hereditaments which are comprised in and conveyed by the several indentures of the 4th and 5th days of December, 1809, and the 11th and 12th days of August, 1812, in the said information mentioned, and whereof no trusts were declared at the date of the said conveyances respectively, and also the hereditaments comprised in and conveyed by the indenture of the 25th day of April, 1843, in the said information mentioned, having been respectively purchased by or for the benefit of the said society at *Birstal*, and annexed to the said premises comprised in the said indenture of the 3rd day of December, 1751, became subject to

the same trusts as are declared of the said premises comprised in the said last-mentioned indenture. 8. And doth declare, that the indenture of the 8th day of September, 1835, and the indenture of the 25th day of April, 1843, respectively, so far as they purport to declare any trusts of the property conveyed by the said indenture of the 3rd day of December, 1751, the 4th and 5th days of December, 1809, the 11th and 12th days of August, 1812, and the 25th day of April, 1843, or any of them, inconsistent with the trusts of the said indenture of the 3rd day of December, 1751, or inconsistent with the rules and regulations of the said people called Methodists, are respectively void and of no effect. 9. And it appearing to the Court, that *S. Beaumont*, *B. Bentley*, *J. Scholefield*, *W. Dewhirst*, and *W. Marsland*, five of the trustees of the said several trust premises, and who were respectively appointed as in the said information mentioned respectively, died before the institution of this suit; and that the late Defendants *T. Pearson* the younger, *J. Adamson*, and *B. Wood*, three other of the said trustees, have respectively died since the institution of this suit; and that the Defendants *G. Elam* and *A. Livesey*, two other of the said trustees, have removed their respective places of abode or residence for the space of twelve miles and more from the trust premises:—This Court doth appoint *W. Priestley*, of *Birstal* aforesaid, mill-owner; *T. Beaumont*, of *Birstal* aforesaid, blanket manufacturer (one of the relators in this suit); *J. Middlebrook*, of *Birstal* aforesaid, draper (the other relator in this suit); *W. Spurr*, of *Birstal* aforesaid, ironfounder; *W. Pearson* the younger, of *Birstal* aforesaid, ironfounder; *W. Nelson*, of *Batley*, in the county of *York*, stonemason; *R. D. Keighley*, of *Batley* aforesaid, surgeon; *J. Thornton*, of *Batley* aforesaid, grocer; *G. Hirst*, of *Gomersal*, in the parish of *Birstal* aforesaid, tailor; *I. Clough*, of *Birkinshaw*, in the parish of *Birstal* aforesaid, woolstapler; and *J. Oddy*, of *Westgate Hill*, near *Birstal* aforesaid, woolstapler, to be new trustees of the said several trust premises comprised in the several before-mentioned indentures respectively, in the several places of the said *S. Beaumont*, *B. Bentley*, *J. Scholefield*, *W. Dewhirst*, *W. Marsland*, and of the said late Defendants *T. Pearson* the younger, *J. Adamson*, and *B. Wood*, and of the said Defendants *G. Elam* and *A. Livesey* respectively. And it is ordered, that all and singular the trust premises comprised in the said several hereinbefore-mentioned indentures, pursuant to the Trustee Act passed in the 13 & 14 Vict. 1850, do vest in the Defendants *J. Clapham*, *J. Nussey*, *J. Fawcett*, *C. Lee*, *W. Pearson*, *D. Hopkinson*, *B. Sands*, *J. Farrar*, *W. Burrell*, *W. Priestley*, *T. Beaumont*, *J. Middlebrook*, *W. Spurr*, *W. Nelson*, *R. D. Keighley*, *J. Thornton*, *G. Hirst*, *I. Clough*, and *J. Oddy*, their heirs and assigns, upon the trusts and for the intents and purposes herein mentioned or referred to of and con-

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cerning the same. 10. And it is ordered, that it be referred to the proper Taxing Master of this Court to tax all parties their costs of this suit as between solicitor and client. And it is ordered, that such costs, when taxed, be raised by the said trustees by mortgage of the trust premises. And it is ordered, that the sum so to be raised be applied in payment and satisfaction of the said costs as taxed. But this direction is to be without prejudice to any application that may be made by the Defendants, the trustees, or any of them, before the last day of Hilary Term, 1854, in respect of payment of the 1800*l.* in the information mentioned, or any other sum claimed to be due to them or any of them by way of charge on the said premises. 11. And any of the parties are to be at liberty to apply to this Court as there shall be occasion.

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The following is the material part of the letter of *John Nelson* referred to in the judgment of the Vice-Chancellor, ante, p. 577 :—

“DEAR FATHER IN THE LORD,—My most earnest prayers (with my best love) for you and your brother are, that God may prosper his work in your hands more and more. [He then describes the death of some persons, probably members of the society at *Birstal*.] The stewards and trustees of the chapel we are building, and which is now slated, desire you to give them advice how the writings must be made, which are to convey the power into the hands of seven men, to be as trustees, and for what use the house and ground are to be employed: and, as it is intended for pious uses, whether it must not be enrolled in Chancery. They desire you to send a copy of the deeds of some of the houses you have been concerned in as soon as possible, for all is in the hands of one man, and if he should die it would cause great confusion before things could be properly settled. We all desire an interest in your prayers, and your advice in this particular. God hath opened the hearts of the people beyond expectation, and we trust he will send help from some quarter, that we may finish what we have begun in his name. I am employed in hewing stone in the daytime, and at night calling sinners to the blood of Jesus. My wife joins in love with me to you and your brother, and all the church of God in that place.

“We think you are long in coming to see us. May God hasten you hither.

“I am your unworthy Son in the Gospel,  
 “*Birstal, Yorkshire, Aug. 29, 1750.*                      “JOHN NELSON.”



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LUMLEY v. ROBBINS.

March 17th;  
April 16th.

GENERAL Sir William Lumley, by his will, dated the 11th of July, 1843, after directing the payment of his debts, and bequeathing to his wife 4000*l.*, stated to be invested in certain debentures, proceeded as follows:—"I direct my executors to stand possessed of the sum of 5000*l.*, at present lent on mortgage to the executors or trustees of my late brother John Earl of Scarborough, or, in case the said sum should be paid during my life, then I direct my executors to stand possessed of a sum of 5000*l.*, upon trust to invest the same either upon Government or real securities, and to vary such securities from time to time as they shall think fit. And I direct my said executors to stand possessed of the interest, dividends, or annual income of the said sum of 5000*l.*, upon trust to pay the same unto my said wife, or permit her to receive the same for and during the term of her natural life; and from and after the decease of my said wife, upon trust to pay, transfer, and assign the said principal sum of 5000*l.* unto my nephew Henry Winchcomb Hartley, absolutely; but in case the said Henry Winchcomb Hartley should die in the lifetime of my said wife, then I direct my said executors to stand possessed of the said principal sum of 5000*l.*, upon trust to divide the same

The testator bequeathed 5000*l.* to his wife for life, and after her decease to his nephew absolutely, but if the nephew should die in the lifetime of the wife, then he directed his executors to divide the same amongst the children of the nephew; and in case the nephew should die without leaving lawful issue, then to pay the same unto and equally between his two nieces, Louisa and Georgiana, for their separate use, and in case one or both of the nieces should die in the lifetime of the wife, then to pay and divide the share

of the niece so dying unto and equally between her children as tenants in common; and the testator bequeathed all monies in the public funds of which he should die possessed, upon trust for his wife for her life, and after her death for the benefit of his nieces, Louisa and Georgiana, in manner thereinbefore directed of and concerning the sum of 5000*l.*; and he gave all the residue, except monies in the funds, to his wife absolutely. One of the nieces died in the lifetime of the wife, leaving children:—*Held*, that the gift of the 5000*l.* to the children of the nieces could not be regarded as a part or modification of the gift to the mother, but was in fact a substitutionary gift to arise on a distinct event;—that the reference to the bequest of the 5000*l.* in the residuary gift of the monies in the funds, by the words "in manner hereinbefore directed," might refer to the manner of taking as tenants in common, or for their separate use;—that the children of the niece did not, therefore, by virtue of the reference, take any interest in the residue of the monies in the funds; and that, as to such monies, so far as related to the share of the deceased niece, there was an intestacy.

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equally between and amongst the children of the said *Henry Winchcomb Hurtle*, share and share alike, as tenants in common; but, in case the said *Henry Winchcomb Hurtle* should die without leaving lawful issue him surviving, then I direct my said executors to stand possessed of the said sum of 5000*l.*, upon trust to pay, assign, and transfer the same unto and equally between my two nieces, the children of my late sister *Louisa*, namely, *Louisa Price Lewis*, wife of the Rev. *William Price Lewis*, and *Georgiana Little*, wife of *William Hunter Little*, for their sole and separate use, independent of their present or any future husbands, their respective receipts being sufficient discharges for the same; and in case either or both of my said nieces should die in the lifetime of my said wife, then I direct my said executors to pay and divide the share of the niece so dying unto and equally between her children as tenants in common; and as to all monies in the public stocks or funds of *Great Britain* of which I may die possessed, subject to the payment of the several legacies given by this my will and to the possibility of the payment of the said sums of 4000*l.* and 5000*l.* as hereinbefore mentioned, I direct my said executors to stand possessed of the dividends, interest, or annual income thereof, upon trust to pay the same to my said wife, or permit her to receive the same for the term of her natural life; and after the death of my said wife, upon trust to stand possessed of the said monies for the benefit of my said nieces, *Louisa* and *Georgiana*, in manner hereinbefore directed of and concerning the sum of 5000*l.*" The testator then gave certain pecuniary legacies; and as to all the residue of his property, of whatsoever it might consist, except money in the funds, he gave the same to his wife absolutely, and he appointed his wife and two others his executrix and executors, and declared that all legacies and monies given by his will should be paid free of legacy duty. He died in December, 1850. *Louisa Margaret Lady Lumley*, the testator's wife, and *Henry* and *Georgiana*, his

nephew and niece, survived the testator. His niece, *Louisa Price Lewis*, died on the 5th day of October, 1846, leaving two daughters and a son, who were infants.

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At the time of the death of the testator, his nephews and nieces, the *Earl of Scarborough* and others, were his next of kin according to the statute of distribution. The only sum of public stock then standing in his name was a sum of 3000*l.* Bank 3½ per cent. Annuities. The 4000*l.* referred to was invested in four debentures, and the 5000*l.* was outstanding on mortgage, as stated in his will. The sum of 330*l.* 4*s.* 4*d.*, part of the stock, was sold to pay the legacies and legacy duty, which left a sum of 2669*l.* 15*s.* 8*d.* like stock; and the opinion of the Court was sought with respect to the latter sum, upon a special case.

The widow of the testator submitted, that, by reason of the death of *Louisa Price Lewis* in his lifetime, there was an intestacy as to a moiety of the 2669*l.* 15*s.* 8*d.* stock, and that she was immediately entitled to the capital of a moiety of such moiety, as well as to a life interest in what remained after the deduction of such capital. The nephews and nieces of the testator, being his next of kin, also submitted, that, by reason of the death of *Louisa Price Lewis* in the testator's lifetime, there was an intestacy as to a moiety of the said stock; and that on the death of the testator's widow they would be entitled to receive either the whole, or, at all events, a moiety of such moiety; while, on the other hand, it was contended on the part of the infant children of *Louisa Price Lewis*, that they were entitled, subject to the life interest of the widow, to a moiety of the 2669*l.* 15*s.* 8*d.* stock.

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Mr. Bacon and Mr. Giffard for the Plaintiff, the widow.

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Argument.

Mr. *A. Cox* for the executors.

Mr. *Toller* for the Earl of *Scarborough* and Lady *Louisa Frances Cator*, a nephew and niece of the testator, and two of his next of kin; and

Mr. *Pole*, Mr. *Walford*, and Mr. *Shee*, for the rest of the next of kin.

Mr. *Follett* and Mr. *William James* for the children of *Louisa Price Lewis*.

The cases cited or referred to in the argument were, *Stanley v. Baker* (a), *Milsom v. Awdry* (b), *Wordsworth v. Wood* (c), *Grassick v. Drummond* (d), *Jarvis v. Pond* (e), *Gray v. Garman* (f), *Doo v. Brabant* (g), *Calthorpe v. Gough* (h), *Ross v. Ross* (i), *Campbell v. Brownrigg* (k), *Gompertz v. Gompertz* (l), *Bland v. Lamb* (m), and *Addison v. Busk* (n).

Judgment.

VICE-CHANCELLOR:—

In this case, the gift of the residue is with the express exception of the funded property; and, therefore, if the fund in question be not disposed of, there is, no doubt, an intestacy; for it cannot fall into the residue. The children of the deceased niece contend, that, in the event which has happened, the moiety of the funded property must be taken to be well given to them; whilst the next of kin claim the

(a) 4 Ves. 732.

(b) 5 Ves. 465.

(c) 4 My. &amp; Cr. 641.

(d) 1 S. &amp; S. 517.

(e) 9 Sim. 549.

(f) 2 Hare, 268.

(g) 3 Bro. C. C. 392.

(h) Id. 395, n.

(i) 2 Coll. 269.

(k) 1 Ph. 301.

(l) 2 Ph. 107.

(m) 2 J. &amp; W. 399.

(n) 14 Beav. 459.

same property. The question is, in fact, between the next of kin and the children of Mrs. *Lewis*. If I were at liberty to conjecture, I could find strong reasons for supposing, that, if all these circumstances had been present to the mind of the testator, he would have wished that the disposition of this residue of his funded property should have been the same as that which he had already made of the 5000*l*. But the question is, whether I can give that effect to the words which he has used; and, considering what I feel must have been his intention, I regret that I cannot. The gift of the 5000*l*. is a gift to the wife for life. After her decease, there is a gift of it to the nieces absolutely, and in case of the death of either to their respective children. There is, therefore, an alternative gift to the nieces, if alive at the death of the widow, or, in case either of them be then dead, to her children. Now, in both the cases of *Ross v. Ross* (a), and *Milsom v. Awdry* (b), there was a gift to the parent for life, with remainder to the children and issue; and the Court seems to have considered that a gift to the parent in one part of the will, although in terms absolute, was cut down by the reference to another part of the will, directing it to be subject to the same conditions and restrictions, or to go in the same manner as such other bequest, and therefore that the legatee of the absolute interest was subjected to all the limitations of the original bequest, and was in effect a trustee of the whole, for the benefit of himself for life, and with remainder upon the trusts mentioned concerning the other gift thus referred to. In *Ross v. Ross* the gift was, in the first place, in terms apparently absolute, but "under the same conditions and restrictions as are hereinafter mentioned respecting the several bequests hereinafter mentioned to them respectively given (a):" Sir *J. L. Knight Bruce*, V. C., in that case, says, "Now, the bequests 'given' are interests to them for life, and then for their children,

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(a) 2 Coll. 269.

(b) 5 Ves. 465.

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with limitations in the nature of cross-remainders between them, and limitations over in favour of a stranger. The words 'conditions and restrictions' are used for placing the absolute interest in a restricted state. In whose favour is that to be? It would be too strict and harsh an interpretation to say merely in favour of the residuary legatee." "The absolute interest is to be divided in the same manner as the absolute interest in the other property which he afterwards gives" (a). The Court, therefore, in that case held, that the donee took the interest, to be carved out by the words of reference from that which was absolute, subject to a life interest in the mother and a remainder in the children. *Milsom v. Awdry* was more like the present case, for there the words were not "subject to the same conditions and restrictions," but "in manner aforesaid" (b). Lord *Alvanley* there says, "The Plaintiffs insist that, upon the death of any one of the nephews or nieces, the share of that one survived to the others, not for their lives only, but absolutely. On the other hand, it is contended, that, upon the death of one, that share went to the survivors, in the same manner as the original shares did—for their lives only; and I suppose it is admitted, that the share of each, both original and accruing, should likewise go to the issue, if any." None of the parties seem to have raised the question of intestacy. Lord *Alvanley* goes on: "It must have that effect. The only question is, how the words 'in manner aforesaid' are to be applied;" and, proceeding apparently upon the same grounds as the *Vice-Chancellor* in *Ross v. Ross*, Lord *Alvanley* says, that the words "in manner aforesaid" could not be referred to a mere tenancy in common, and that they would be mere surplusage, unless they were construed to refer to the benefits pointed out for the children. "I cannot help saying," he adds, "though it is but a conjecture, that the testator meant them to take

(a) 2 Coll. 272.

(b) 5 Ves. 465.

that surviving share under the same terms, and subject to the same restrictions and limitations as the original share" (a).

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In both these cases, therefore, the children did, in fact, take a share, but it was carved out, and the whole subject of the gift divided into the original and subsequent interests. But, in the case before me, I must go much further than either of those cases to support the gift to the children. There is an absolute legacy to take as tenants in common, but there is no intention expressed in any part of the will to carve out separate interests as between the mother and children. The whole subject of the gift is to go in one event to the mother, and in another event, if the mother be not living, to the children. There is great difficulty in construing such a gift as a gift to the children of the nieces, when the gift is to his nieces "in manner aforesaid." I am, in truth, asked to say that a gift, which is in terms for the benefit of the nieces, is to go over in the manner and upon an event in which they could have no interest whatever. I at first thought, that, by analogy to *Campbell v. Brownrigg* (b), this might be held to be a gift to the children beneficially. There was, in that case, in words, first, an absolute gift to the testator's daughter, modified by the expression, that, in the event of her having children, the subject of the bequest should be equally divided amongst them; and the Court held, that, although the daughter died without children, yet the absolute gift still took effect; holding, as I understand it, that the expressions in favour of the children were, in fact, only a modification of the peculiar interest given to the parent, and if that modification became in the event unnecessary, the absolute interest was not affected. In effect, the limitation to the children was regarded as not inconsistent with

(a) 5 Ves. 467.

(b) 1 Ph. 301.

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the absolute gift to the parent, the words of that gift expressing it to be for the benefit of the parent. It occurred to me that I might possibly arrive at this construction, but I regret that I cannot.

I cannot here hold the converse of the case of *Campbell v. Brownrigg*. To hold that the children might take for the benefit of the parent under the words "in manner aforesaid," would be going beyond *Milsom v. Awdry* or *Ross v. Ross*. In those cases there was a clear interest limited to the parent for life, with remainder to the children, and the whole interest was not by the first gift entirely parted with. Here, instead of a gift to be modified in a particular manner, we have a gift to A., and, on a certain event happening, a gift of the same fund to B. And then we have another fund given to A. "in the same manner." That cannot be held to carry over the gift to other persons not named in it. If there had been a limitation to a parent for life, with remainder to the children, it would have been much more favourable; but even then, it would not have been without difficulty. I cannot help observing, that, in *Milsom v. Awdry*, Lord Alvanley expressed great doubt. He changed his mind in the course of the discussion, and ultimately decided as he did, because there was nothing else to which the words "in manner aforesaid" could be applied. He could not apply those words to the tenancy in common in the subsequent gift, and they must otherwise have remained without meaning or application. In this case there is abundant meaning in the words "in manner aforesaid," without referring to the gift over. For here the original gift of the first fund to the nieces is to them as tenants in common, and for their separate use; and the second gift is not a tenancy in common, but is a joint tenancy, unless qualified by the term "in manner aforesaid." So we have not here the circumstance on which alone larger effect was given to the words of reference by Lord Alvan-



ley. I should, therefore, be going one step further than Lord *Alvanley* in a case in which that learned Judge was not perfectly satisfied with the conclusion to which he arrived. Here there is an absolute gift to *A.* for her separate use, and a subsequent gift to her "in manner aforesaid;" and I am asked to hold, that the subsequent gift is not only a gift to her, but to other persons, who take the subject of the previous gift in substitution for her.

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—  
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The words "in manner aforesaid" may well be referred to the mode of enjoyment of the interest. If authority for this were wanting, *Shanley v. Baker* (a) would be sufficient. The words may be satisfied by taking, first, the tenancy in common, and, secondly, the separate use. I have little doubt what the testator would have done had his attention been called to the question; but I feel bound to decide that the gift of this interest has lapsed, and that it is divisible amongst the next of kin.

(a) 4 Ves. 732.

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March 6th &  
7th.

## CARTWRIGHT v. CARTWRIGHT.

By a marriage settlement, an estate was conveyed to trustees, upon trust to pay the rents and profits to the intended wife during her life, for her separate use, but the same to be applied for the benefit of herself, and also for the support, maintenance, and education of the children of the marriage; and, after the decease of the wife, to the use of the husband, with remainder to his first and other sons in tail; and it was provided, that, in case a separ-

A SETTLEMENT of real estate, made previously to the marriage of *Henry Cartwright* and *Ellen* his wife, then *Ellen Grimes*, dated the 10th of July, 1839, directed the trustees, subject to certain charges therein mentioned, to pay the rents and profits to *Ellen Grimes*, the wife, for her separate use, to be applied by her for the benefit of herself, and also for the support and maintenance and education of the children of the marriage, if there should be any, and limited the estate in remainder to *Henry Cartwright*, the husband, for his life, with remainder to his issue in tail; and the settlement contained the following proviso:—

“ Provided always, and it is hereby further declared and agreed by and between the parties to these presents, that, in case a separation shall take place, by reason of any disagreement or otherwise, between the said *Henry Cartwright* and *Ellen Grimes*, after the solemnisation of the said intended marriage, then and in such case the rents, issues, and profits of the said lands and premises so limited in use to the said *Moses Cartwright* and *K. W. Hand*, and

ation should take place, by reason of any disagreement or otherwise, between the husband and wife after the marriage, the rents and profits should, from the time of such separation, during the joint lives of the husband and wife, be paid to the husband for his own use, but without prejudice to the right of the wife to receive them for the remainder of her life, in case she should survive her husband. Upon a claim, filed by the husband against the trustees and the wife, to enforce the proviso—*Held*, that the separation referred to, if it received a judicial construction, could not be construed as applying to an accidental and temporary separation arising from the state of health of the parties, or from the necessity or convenience of residing in different places with their mutual concurrence, nor to a separation arising from the absence of the husband on business; but that it must be construed to mean, either a separation by contract between the husband and wife, or the result of proceedings in a Court of competent jurisdiction.

That, supposing the proviso to be valid, a Court of equity would not give effect to it in favour of the husband, where the separation had taken place under the sentence of a Court of competent jurisdiction, founded upon the misconduct of the husband, entitling the wife to a divorce a mensâ et thoro.

But, whether the proviso for the event of a separation was not wholly void, or whether it could be supported by construing the settlement as making a provision for the wife and children so long as the wife should reside in the house of the husband, and to go over upon her ceasing to do so—*Quære*.

their heirs, during the natural life of the said *Ellen Grimes*, in remainder expectant upon the decease of the said *Thomas Cartwright*, and subject to the aforesaid two several terms of years aforesaid, shall, from the time of such separation, and thenceforth during the joint natural lives of the said *Henry Cartwright* and *Ellen Grimes*, but subject and without prejudice to the life estate of the said *Thomas Cartwright*, and also without prejudice to the said two terms, or such one of them as shall be capable of being exercised in the events which may happen or the trusts thereof, be paid to, or shall be permitted to be received and taken by, the said *Henry Cartwright* and his assigns, to and for his and their own use and benefit, instead of being paid to the said *Ellen Grimes* for her sole and separate use as hereinbefore directed, but without prejudice to the right of the said *Ellen Grimes* to recover such rents and profits for the remainder of her natural life, in case she shall happen to survive the said *Henry Cartwright*, subject, nevertheless, to the aforesaid terms of 100 years and 600 years, and the trusts thereof."

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 Statement.

In June, 1852, *Henry Cartwright*, the husband, filed his claim against his wife and the trustees of the settlement, stating that, up to the year 1846, the Plaintiff and the Defendant his wife resided together at *Hill Hall* (the residence also of the said *Thomas Cartwright*, the father of the Plaintiff); but in the beginning of that year she went to reside with her mother at *Derby*; and that, although the Plaintiff understood her absence would be only temporary, she avoided and refused to return and reside with the Plaintiff, and that they had since that period lived in a state of separation; that, in 1850, the Plaintiff commenced proceedings in the Ecclesiastical Court against his wife for the restitution of conjugal rights; to which proceedings the wife replied by allegations of cruelty and adultery, praying a divorce *a mensâ et thoro*; that subsequently the allega-

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tions of cruelty were ordered by the Court to be expunged; but in June, 1851, a decree for a divorce a mensâ et thoro was pronounced in the suit; and that the Plaintiff and his wife had continued to live separate and apart from each other. The claim stated the death of *Thomas Cartwright* the father, in April, 1851, and prayed a declaration of the Plaintiff's title to the rents and profits of the settled estate, and a decree for payment of the same by the trustees.

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*Argument.*

*Mr. James Russell* and *Mr. Terrell* for the Plaintiff.

*Mr. C. M. Roupell* for the trustees of the settlement.

*Mr. Daniel* and *Mr. Amphlett* for the Defendant *Ellen Cartwright*.

The following cases were cited: *Vandergucht v. De Blaquiére* (a), *Lord St. John v. Lady St. John* (b), *Wilson v. Mushett* (c), and *Cocksedge v. Cocksedge* (d).

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*Judgment.*

VICE-CHANCELLOR:—

This is a very painful case, and if I had to determine it solely on the question, whether a limitation of this kind can be allowed to have any legal effect either at law or in equity, I might require further time for consideration; for, as Lord *Cottenham* observed in *Vandergucht v. De Blaquiére* (e), the law is not in so completely a clear and satisfactory state as it could be wished that it were on a question of such importance. I think, however, without in any

(a) 5 My. & Cr. 229.

(b) 11 Ves. 526, 530.

(c) 3 B. & Ad. 743.

(d) 5 Hare, 397, 404; & C., 14 Sim. 244.

(e) 5 My. & Cr. 243.

way wishing to avoid the consideration of the question, that this case must be determined on the peculiar circumstances of the parties, and on the position in which the Plaintiff finds himself, as being under the necessity of coming for the assistance of this Court to compel the trustees to pay him the rents and profits under the limitation in question.

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Independently, then, of what may be the legal validity of such a limitation, I have no doubt as to the construction that must be put upon it. The property has been settled by the father of the husband, and a life estate is given to the wife, with a proviso, that, in case a separation shall take place, by reason of any disagreement or otherwise, between the husband and intended wife after the solemnisation of their marriage, then the rents and profits are to go over to the husband, instead of being continued to be paid to the wife for her separate use.

Now, I apprehend that the limitation on the event of a separation, by disagreement or otherwise, can scarcely be considered in any way as applying to a separation of an accidental character. It could not apply to the separation as it originally took place in this case, by the lady leaving *Hill Hall* for the purpose of attending on her sick mother, and which was occasioned by some disagreement that had taken place between herself and her husband's father. Suppose the case of the husband having to go to *India*, and thinking it desirable to leave his wife in this country, it could not be contended that the separation contemplated in this proviso had reference to that state of circumstances. Looking to the peculiar state of the law with regard to husband and wife, and to the fact that she cannot separate from her husband except by contract, inasmuch as the husband has always the power to institute proceedings for the restitution of conjugal rights, I apprehend that the proviso must be

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taken as looking to a separation either by contract, or by proceeding in the Ecclesiastical Court, or a Court of competent jurisdiction. These are the only two cases that could have been contemplated, and this materially facilitates the construction of the contract, and gets rid of all that is vague in the term "separation," on which a good deal of argument has been addressed to me.

I apprehend also, that no Court, either of law or equity, would construe the separation, which is, according to this settlement to determine the wife's life interest and transfer the property to the husband, to have been intended to apply (whether it could or could not legally so apply) to a case in which the separation was occasioned by the act of the husband. That would be to give to the husband an estate and interest to be created by his own wrong, which I am sure that this Court would not do, whatever might be the result in a Court of law.

Assuming, as I do, for the purpose, and only for the purpose of this discussion, the validity of the contract, but without saying anything to lead to the opinion that I suppose such a condition to be valid, the question arises, whether such events have taken place as entitle the husband, in a Court of equity, to say the Court will give effect to this limitation in his favour, and direct the trustees to pay over to him the rents and profits in derogation of his wife's interest. The case has been rested on this,—that the separation took place in the first place in 1846, or that, if it did not take place in 1846, at least it took place in 1850, when the husband wrote a letter, evidently penned (there was no impropriety in that) with the assistance of his solicitor, and with the view of bringing matters which had been in an uncomfortable state between himself and his wife to a crisis, in order to determine whether or not he would be in a situation to institute proceedings for the re-

stitution of conjugal rights. In 1846 the matter stood in this position: the lady had left the house of her husband's father, where she had been residing since her marriage, in company with her mother, who had married her husband's father, partly with the intention of nursing her mother, who seems to have been in a bad state of health, which continued down to her death, and partly also from violent conduct on the part of the husband's father, with threats, which I do not suppose were intended to be carried literally into execution, of burning the house down, of striking her, and other unpleasant demonstrations of that kind, which of course I only conceive to be expressions of strong dislike and repugnance on the part of the father to his daughter-in-law. That state of circumstances seems to have induced the husband to consider it to be very proper that the wife should leave his father's house. There was an excuse to the world for her leaving, from the circumstance of her mother's illness, and accordingly she left the house of her husband with his perfect sanction. He assists at her departure in seeing her off, and she proceeds to *Derby*, where the wife and her mother remain until the proceedings in the Ecclesiastical Court took place, four years afterwards.

Now, I have read through the whole of the correspondence, which counsel, in the exercise of a very wise discretion, did not read in Court, and the result which has been produced on my mind by that perusal is, that this lady entertained a very great affection for her husband during the whole period of their separation, almost, indeed, if not quite, up to the time of her receiving that formal letter, requesting her to return; because, although there is perhaps somewhat less warmth in the latter letters as compared with the former, still there are very affectionate letters as late as the month of March, 1850; and there does not appear to me to have been the least intention on the part of the lady of perpetually absenting herself from her husband. They had

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been separated, for peculiar reasons relative to the lady's health, before she left her home, but it has not been contended that that was a separation within the terms of the deed, although, when the husband came, as he did frequently to *Derby*, he was excluded from the house at which this lady was residing with her mother. He came repeatedly to *Derby*, and down to a period as late as March, 1850, immediately before his formal letter was written, he writes this letter. [His Honour read a letter from the husband to the wife, dated in March, 1850.] There was nothing at that time shewing any final determination of these parties to come to an actual separation, or that there was anything that might be called a final separation, and, even after that formal letter was written, there are intimations on the part of the lady shewing that she was not indisposed to return, provided that some other residence than *Hill Hall*, where her father-in-law still lived, was provided for her. Her father-in-law not having expressed the least wish to see her again at his house, she would naturally be unwilling to force herself back on the residence of one who had strong objections to her residing with him. The husband's own conduct is quite inconsistent with Mr. *Russell's* theory of the separation. I have before said, I conceive the true construction of the deed is, a separation with the consent of the husband, because, until that consent be given, there is no such thing as a perfect separation. The husband has his remedy by a proceeding for the restitution of conjugal rights. It is not the wife leaving him which makes a separation on which I could give effect to this proviso. Indeed, the husband takes that view, and this part of the case is certainly to his credit. He does not say there is a separation; he does not say, "I will insist on this proviso, and by my own act take care to secure to myself the benefit of this life interest." On the contrary, his conduct appears to have been this:—he says,—“I am anxious for you to return home;” and so far from treating what had taken place as a separation, he



says,—“I shall institute a suit for the restitution of conjugal rights and prevent a separation.” That is the last step he takes up to the time of the proceedings in the Ecclesiastical Court.

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Supposing then the proviso in the deed to be valid, and assuming the lady to have returned, would anybody have said that the proviso had come into effect, and that her interest had determined? The answer would have been, there never was any separation; on the contrary, the wife is in the home of the husband. He had never precluded himself from the exercise of his marital right, and she is entitled to her life interest. That is how the case appears to me to have stood up to the time of the proceedings in the Ecclesiastical Court. Then, the proceedings being taken in that Court, the lady resorts to a mode of defence which was perfectly competent to her. According to her own account in her allegations, she appears to have considered then, for the first time, the necessity of inquiring into what had been her husband's conduct, in case he insisted on the restitution of conjugal rights, with a view to ascertain whether that conduct had been such as would render it incumbent on her to return to his roof, or whether it was such as, in her view of the propriety of that course, to prevent her from so doing. I agree with the observations of the counsel for the plaintiff, that neither the law, nor the usages of society, impose on any lady the necessity of separating from her husband in respect of his conjugal infidelity. The House of Lords have acted on that principle. They have declined, in most cases, to grant a divorce a vinculo at the instance of the wife, on the ground that it is not a degradation to a female to condone this delinquency on the part of her husband; whilst the usages of society, whatever may be their foundation in morals, regard such delinquency on the part of the wife as an indelible disgrace on the husband, which does not admit of condonation. The House of Lords have, therefore, encour-

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aged (if I may say so) condonation on the part of the wife, and have not granted her a divorce a vinculo, except in some cases where there has been gross misconduct on the part of the husband. But that does not prevent a wife from obtaining her remedy in the Ecclesiastical Court, if she thinks there is a case of misconduct on the part of the husband, which she cannot condone. If the wife were to consider her life to be in danger, in consequence of cruelty, or her health or her happiness in peril from living with her husband after he has so misconducted himself by adultery, she has a right to insist on that defence, and to bring it forward as a reason why she should withdraw herself from his society. That is the course taken by this lady in the present case, by her defence in the Ecclesiastical Court; and the result of the proceedings has been to prove acts of infidelity on the part of the husband anterior to the demand which he made that she should return to his society, a demand not made until 1850. The acts then proved took place before the time that the lady had in any sense permanently separated herself from her husband, even if it could be considered as in any respect a separation within the meaning of the contract. Up to the year 1848, I do not think there was the least withdrawal with a determination of not returning, and it turns out that before any such withdrawal had occurred, cause had been given by her husband, sufficient, in her view of her position, to induce her and to enable her in law no longer to cohabit with him; and then the separation takes place.

On behalf of the husband it has been argued, that, if I give this construction to the deed, that it must be a separation for a just cause, I first import words into the deed that are not to be found in it; and, secondly, I introduce an issue which it is extremely difficult for this Court at any time to try. It is enough for me to say, that I conceive, without introducing the term "just cause," I may, in a Court of equity,

and I think a Court of law would adopt the same construction,—I may fairly import into the contract the meaning, that the separation contemplated shall be a separation not produced by the default or the misconduct of the husband,—not meaning, by what I say, conduct or acts arising from asperities of temper, or faults of manner, merely making it unpleasant for the wife to reside with him, but definite acts involving such breaches of duty as enable the wife, in law, to say she will separate from her husband, and which enable her to obtain from a Court of competent jurisdiction a sentence protecting and justifying her in that separation. I do not think that any Court of law would allow an estate to arise to a party by his committing an illegal act,—the title which he claims being the result of the operation of that illegal act. If the husband had deserted the wife (which in itself is an illegal act), or if he had by cruelty given her the right to obtain the separation, or if he had by adultery (as he has in this case) given her that right, in any of those cases it appears to me—assuming the covenant to be valid—the husband would have had great difficulty in maintaining at law a right so acquired. Certain I am that in this Court he cannot be heard to say, “True it is I have occasioned this separation—true, I have thus determined my wife’s interest; nevertheless, I am entitled to the assistance of this Court to enable me to obtain rents and profits which I have in reality gained by my own misconduct.”

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There was a part of this case which made me anxious to hear the other side, namely, the provision in the settlement for the wife and children. I think that is a point which might very well bear considerable discussion, and one which would have much weight in an argument on the validity of this covenant. It is one of those points that would make me cautious in expressing an opinion on this case. It is possible—I do not say it is so—that provision may be

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made for the purpose of applying the rents and profits for the benefit of the wife and children, as long as the wife lives in the house of the husband; and when they separate, then that the rents and profits should go over. That is not what the clause expresses in this particular case, but such a limitation might give rise to some argument.

I am bound also to say, that, although the husband has been placed in a situation of a very painful nature, which may be said to be some palliation for his conduct, whatever were the causes which led to the departure of his wife—whether it was health—certainly, from her letters, it would not appear to be any want of affection—although this separation from his wife from 1846 may offer a palliation for his conduct which would not occur in other cases, yet it is impossible to overlook the consequences of his having allowed himself to be tempted, by the unfortunate situation in which he was placed, into that unhappy misconduct which is the only ground now for the continued separation. It appears to me that this misconduct is the only legal ground for it; and I cannot allow that misconduct to have the effect of depriving the wife of her estate, or of handing it over to the husband. Under these circumstances I must dismiss his claim, and I am obliged to dismiss it with costs.

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## HAVENS v. MIDDLETON.

March 5th,  
8th, & 11th.

*CHILD* demised a plot of building land, in *Sydenham Grove*, to *Plasket*, for a term of eighty years, from June, 1836; and in the lease there was a covenant that the lessee should insure and keep insured the premises against fire during the term, in the joint names of himself and the lessor, and his executors, administrators, and assigns. *Plasket* made an underlease of the premises to *Martin* for the whole term except one day. *Martin* assigned his underlease to *Mrs. Whiting* by way of mortgage, with a power of sale. *Mrs. Whiting*, and after her death her executors, insured the premises in their own names and in the names of the executors of *Child*, and not in the name of *Plasket*, whose residence (if he were living) was not known. The executors of *Mrs. Whiting* exercised their power of sale by auction; and the Defendant was the highest bidder, and paid his deposit. He afterwards objected to the title, on the ground that the insurance had not been effected in the joint names of the lessor and lessee, according to the covenant; and he brought an action to recover his deposit. The vendors thereupon filed the bill for specific performance of the contract, and to restrain the action. It was at first contended, on the part of the Defendant, that the question was a simple one, which might be conveniently and perfectly tried in the action; but it was ultimately agreed that the Court should, upon the motion, determine the question of specific performance.

After the objection to the title had been taken, the vendors procured the assent of the lessor to the form of the insurance, and obtained from him a receipt for the ground rent—expressing that assent by the addition thereon of

A covenant by the lessee to insure the demised premises in the names of himself and the lessor,—although not performed literally, by an insurance in the name of the lessor only, is yet so far substantially performed for the benefit of the lessor, that he could not recover for a breach of the covenant,—the stipulation for the insurance in the name of the lessee being for the exclusive benefit of the latter, and which he is at liberty to dispense with:—*Held*, therefore, that the circumstance that the original lessee could not be found, and that no insurance could be effected in his name, was not an objection to the title of an under-lessee.

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this statement: "the policy of assurance having been this day produced to me, and approved of."

*Argument.*

Mr. Rolt and Mr. W. Rudall for the Plaintiffs.

Mr. Bacon and Mr. W. H. Clarke for the Defendant.

*Penniall v. Harborne (a)* and *Doe d. Muxton v. Gladwin (b)* were cited on behalf of the Defendants.

The cases of *Clive v. Beaumont (c)* and *Warren v. Richardson (d)* were also mentioned.

*Judgment.*

VICE-CHANCELLOR:—

The question has been brought before me on a motion for an injunction to restrain the Plaintiff at law from proceeding with an action which he has brought against the auctioneer, to whom he paid a deposit of 60*l.*, on being declared the highest bidder for certain leasehold premises in *Sydenham Grove, Norwood*. The bill also prays a decree for specific performance of the contract. The action is brought on the suggestion that the vendors are not able to make a good title, and the parties have agreed that the question should be determined by the Court upon the motion.

I do not feel that there is any difficulty in the case. The only point is, whether the title is defective, owing to a covenant in the original lease under which the premises are held, that the lessee shall keep them insured from fire in the joint names of himself and the lessor. *Plasket*, the original lessee, has demised the premises, reserving

(a) 11 Q. B. 369.

(b) 6 Q. B. 953.

(c) 1 De G. & S. 397.

(d) *Younge*, 1.

one day; and the parties holding the underlease have taken upon themselves to insure and have insured the premises in the names of *Havens*, one of the parties interested in such underlease, and the name of the original lessor. This, of course, was not a strict performance of the covenant. They were not entitled to substitute any other names for those which were pointed out by the lease, or to place the lessor in a situation, with regard to the joint insurance, different from that which was expressly required by the contract. In consequence of the difficulty thus created, the vendors, after some correspondence had taken place upon this question, produced the policy to the lessor, and obtained a receipt for the ground rent up to that time, expressing that he had seen and approved of the policy. I apprehend that, after this approval, the lessor could not succeed in ejectment, even if he might, owing to the absence of any release under seal, have brought an action of covenant upon the lease. In *Doe v. Gladwin* (a), the lessor of the Plaintiff, who was the assignee of the original lessor, was held to be entitled to recover in ejectment, notwithstanding a receipt for rent given by the original lessor, when he was cognisant of the forfeiture having been incurred; but there the lessor of the Plaintiff recovered only in consequence of the subsequent breaches. It was not contended that he could have recovered in respect of any forfeiture of which the lessor was cognisant prior to that receipt. So, in this case, I think it is clear the original lessor would not be entitled to recover in ejectment, in consequence of any breach covered by the receipt which he gave. But then it is said, that this difficulty has arisen, in consequence of which there cannot be a literal performance of the covenant, that *Plasket*, who has reserved to himself the reversion of one day, is not to be found, and that there might be some remedy on the part

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(a) 6 Q. B. 953.

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of *Plasket* in respect of any future breach, because the name of *Plasket* cannot be hereafter used in the policy of insurance; and thus the covenant cannot be strictly complied with, nor the sub-lessee protected from future breaches as against the original lessor. As to *Plasket* himself, I think there is no difficulty. He has made an underlease, and there is no covenant by the underlessee to him to perform the covenants in the original lease. He could not enter, neither could he bring an action of covenant, although it may be suggested that he is entitled to some implied indemnity. As to the original lessor, the case is somewhat different. The original lessor may convey his interest, his assignee may not approve of this form of insurance, and it would be a continuing breach of the covenant.

The question then is, whether, supposing such a continuous non-compliance with the strict terms of the covenant, there would, as a consequence, be a forfeiture of the interest of the lessee. I have looked at the cases on the subject, and I have not been able to find any case in which it has been held, upon a covenant to insure in the joint names of the lessor and lessee, that the lessor can complain because the insurance is effected in his own name only. The two cases cited (*Doe v. Gladwin* (a) and *Penniall v. Harborne* (b)) are very intelligible. The first case I have already noticed. In *Penniall v. Harborne*, the lessee had covenanted to insure in the name of the lessor only, and he insured in the joint names of the lessor and himself the lessee. That was held not to be a performance of the covenant. It was not so beneficial to the lessor as the arrangement for which he had stipulated. It did not give him the sole and absolute control over the monies to be recovered, and, if the lessee happened to survive, it placed

(a) 6 Q. B. 953.

(b) 11 Q. B. 360.



the lessor's representative in a position in which he might be subject to the inconvenience of looking to the estate of the lessee, and to questions with which he ought not to be embarrassed. But in this case the insurance was to be in the joint names of the lessor and the lessee. The introduction of the name of the lessee is for his own benefit, and its omission is his own loss. The intention must be looked to; and there is no authority for saying that a lessor could succeed in ejectment because something had been done by the lessee less beneficial to himself than he had stipulated for. Suppose the case of a dispute between *A.* and *B.*, in the course of which *A.* covenants to deposit a sum of money in the joint names of himself and *B.*, to abide the event, and he pays it into the sole name of *B.*, there could be no action of covenant sustained by *B.* against *A.* because *A.* had given him a greater benefit than he had agreed to do. I do not see any possible benefit which could accrue to the lessor from having the name of the lessee inserted in the policy. I do not think, therefore, that the difficulty in the way of the strict performance of the covenant in this case is an objection to the title; and this being the only question—the Defendant having very fairly waived any other objection—there must be a decree for the specific performance of the contract.

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—  
*Judgment.*

1853.

March 18th,  
19th, & 22nd.

NEWTON v. CHORLTON.

The contract of suretyship entitles the surety to require that his position shall not be altered by any arrangement between the creditor and the principal debtor, from that in which he stood at the time of the contract; and it, therefore, entitles him absolutely to the benefit of all the securities for the debt which the creditor held at the time of the contract; it also entitles the surety, at any time, to require that the creditor shall enforce against the principal debtor or not only all his remedies, and all the securities for the debt

which he has at the time of the contract, but also any securities for the debt which the creditor may have acquired subsequently to the contract, and which he holds at the time that the surety requires him to proceed. And as a person paying off a debt for which he is liable, is entitled, in equity, to stand in the place of the creditor, and to have the benefit of the securities held by the creditor for such debt; so the surety, on paying off the debt of the principal debtor, is entitled to require from the creditor the benefit, not only of the securities for the debt which the creditor had at the time of the contract of suretyship, but also of all the securities which he holds at the time he is paid off. But there is no implied duty in the contract of suretyship, which requires the creditor to retain, for the benefit of the surety, securities for the debt which he might subsequently receive from the principal debtor, and which, whilst the creditor holds them, the surety does not call upon him to enforce. And a creditor, who, after the contract of suretyship, having taken a further security from the principal debtor, subsequently parts with that security, does not thereby, either wholly or pro tanto, release the surety.

THE bill was filed by *James Newton*, the son and executor of *James Antrobus Newton*, against *Samuel Chorlton*, the personal representative of *Edward Reddish*, he being the executor of *Joseph Reddish*, who was the executor of *Edward*, to restrain *Chorlton* from prosecuting an action which he had brought against the Plaintiff upon a joint and several bond for 1200*l.* and interest, which the Plaintiff's testator *James Antrobus Newton* had, with one *George William Newton*, made to the Defendant's testator *Edward Reddish*, as surety for *George William Newton*, to secure 600*l.* and interest; and the bill prayed the declaration of the Court that the estate of *James Antrobus Newton* was, under the circumstances, discharged from any further liability in respect of the bond.

The relief of the plaintiff's testator's estate from his liability as surety was sought on the ground, that, after the Plaintiff's testator had become surety to *Reddish*, *Reddish* had taken from *George William Newton*, the principal debtor, a deposit of his title deeds of a perpetual chief rent of 56*l.* 4*s.* 10½*d.* a year, with a memorandum stating that they were so deposited as an auxiliary security for the bond debt for 600*l.* and interest; that *Joseph Reddish*, as the

executor of *Edward Reddish*, had allowed the deeds to be taken by *George William Newton*, upon his undertaking to return them; but that *George William Newton*, instead of doing this, had sold and conveyed the rent charge to a purchaser without notice of the lien, whereby the same was lost, and the Plaintiff's testator's estate deprived of the benefit thereof.

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—  
Statement.

Mr. *Rolt* and Mr. *Smythe* for the Plaintiff.

Argument.

Mr. *Bacon* and Mr. *Osborne* for the Defendant.

The cases cited, in addition to those which are mentioned and commented upon in the judgment, were the following : —*Praed v. Gardiner* (a), *Copis v. Middleton* (b), *Dowbiggen v. Bourne* (c), *Benson v. Cox* (d), *Hodgson v. Shaw* (e), *Yonge v. Reynell* (f), and *Bowker v. Bull* (g). *Story's Equity Juris.* Vol. 1, p. 262, s. 324 was also referred to.

VICE-CHANCELLOR :—

This case raises a point with reference to the rights of a surety in respect of a contract of suretyship as affected by the conduct of the creditor with regard to the principal debtor; and I do not find it to be covered by any of the decided cases, though it is somewhat singular that such a case should not have before occurred and been decided. I have been greatly assisted in my investigation of the cases by the argument of counsel. The principles settled by decided authorities, so far as they have gone, enable me to arrive,

Judgment.

(a) 2 Cox, 86.

(b) T. & R. 224.

(c) 2 Y. & C. 462.

(d) 4 Beav. 379.

(e) 3 My. & K. 183.

(f) 9 Hare, 809.

(g) 1 Sim. N. S. 29.

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with tolerable clearness, at a conclusion as to the rights of the parties in this particular case.

The question is this:—*James Antrobus Newton*, the party whom the Plaintiff represents, entered, in 1810, into a bond as surety for his brother *George William Newton*, to a person of the name of *Edward Reddish*, for the payment of 1200*l.* Three years afterwards the creditor took a security, by way of deposit, of certain title deeds of the debtor, with a memorandum in these terms: “I the undersigned do hereby acknowledge that the above-mentioned indentures were this day deposited in my hands as an auxiliary security to a bond, dated the 17th of March, 1810, from the said *George William Newton* and *James Antrobus Newton* to me, for securing 600*l.* and interest; and I hereby undertake to return them safe and uncanceled on payment of the said sum of 600*l.* and interest. As witnesseth my hand, this 30th day of October, 1813. *Edward Reddish.*” Subsequently, this security is allowed by *Mr. Reddish*, the principal creditor, to get back into the hands of the debtor; and the result is, the security is lost: and the question which then arises is, whether or not the surety, in consequence of this transaction, which took place subsequently to the date of the original contract of suretyship, is released.

Now, as far as the cases have gone, I think they have established certain principles very clearly. The doctrine, perhaps, is laid down most lucidly in the case which was first referred to (*Craythorne v. Swinburne (a)*), in the extremely able argument by Sir *Samuel Romilly*, adopted by Lord *Eldon*, in that case. Lord *Eldon* may be taken clearly to adopt the words of Sir *Samuel Romilly*, that the whole doctrine as to principal and surety is raised

(a) 14 Ves. 60.

upon the established principles of a Court of Equity, not upon a contract, except as it may be represented to be made, with the implied knowledge of the existence of those principles. It is upon that, that the whole of the rest of the argument is founded; I apprehend it cannot be said in strictness, that it rests upon contract. There are certain fixed principles of equity, which follow necessarily from the contract of suretyship, and which principles must be taken to be known by all the contracting parties,—the creditor, the surety, and the principal debtor,—and they from a part of the effect of the suretyship. In that sense only is it a matter of contract.

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 —  
*Judgment.*

Further than that, it has been established, not only in that case, but in the case that Lord *Eldon* refers to of *Deering v. The Earl of Winchelsea* (a), and in the case which he himself decided of *Mayhew v. Cricket* (b), which followed it, that, by virtue of the contract, a surety,—whether he be informed of the existence of other securities or not,—is entitled as between himself and the creditor to the benefit of any mortgage or other security held by the creditor, whether he knows it is held or does not know it is held by him at the date of the contract: that is decided in *Mayhew v. Crickett*. I apprehend that when the parties enter into a contract of suretyship, they all agree that there shall be the utmost good faith between them,—that the situation of the creditor and of the principal debtor shall be perfectly made known to all the sureties; and therefore the creditor is conceived to have made known to them, whether in fact he does so or not, every security which he possesses, perhaps also the existing position of the parties at the time the contract is entered into. That is put by Lord *Truro* very clearly in the case of *Owen v. Homan* (c), in which he says, “The cases which

(a) 2 Bos. & P. 270. (b) 2 Swanst. 185. (c) 3 M. & Gr. 378.

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are reported have generally arisen out of transactions in which there has been personal communication between the creditor and surety; and the clear law deducible from those decisions is, that the creditor must make a full, and fair, and honest communication of every circumstance calculated to influence the discretion of the surety in entering into the required obligation." Then he compares it to the case of a contract for insurance, in which everything must be made known to the insurer, with reference to all the circumstances that surround the contract he is about to enter into. Therefore, I apprehend, it is on those grounds that every security, whether by way of suretyship, or mortgage, or otherwise, of which the creditor has the benefit at the time of the contract being entered into, is supposed to be made known to the surety when he is entering into the obligation, and the surety is to have the benefit of them; and no act can be done by which he is to be deprived of that benefit, or put in a different position from that which he was in at the time of the contract being entered into.

The next thing I have to consider—which was very well distinguished in the argument—is, what are the equities which are now to form part of this implied contract, as regards, first, the principal debtor; secondly, his co-sureties; and, thirdly, the creditor? Now, as regards the principal debtor, I think the authorities amount to this—that the creditor is clearly entitled to have all the debt or liability made good as between himself and the debtor—(I am now speaking of the case as between him and the creditor)—the creditor is entitled to have the liability made good by the principal debtor in the first place; and, secondly, by every security existing in his (the creditor's) hands which has been so placed by the debtor. As regards the co-sureties, Lord *Eldon* said, in *Craythorne v. Swinburne*, that equity is equality of contribution. Although the creditor has a perfect right to attack any one of the sureties

that he pleases, yet, as between the co-sureties, the claim of the creditor is not to operate on their condition—they are not to be subjected to his caprice or discretion in his regard for his own interest; but among themselves they are to contribute equally, or rateably if they are bound in different proportions.

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 —  
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Then, as regards the creditor, what is the question that arises in the case before me? The question is, what are the rights as between the surety and the creditor with reference to the contract they have entered into? As regards the creditor, it is decided that he is not bound by mere negligence—unless it be in the shape of what I may call active negligence (*a*)—that is quite settled: but it is held, that he is bound to give to the surety the benefit of every security which he holds at the time of the contract—every security which he then holds; and he is not allowed in any way to vary the position of the surety with reference to those securities: that has been decided most distinctly in *Mayhew v. Crickett* (*b*) by Lord *Eldon*, where there was a warrant of attorney in the hands of a creditor put into operation by the creditor, and a judgment obtained, from which he afterwards discharged the principal debtor. Lord *Eldon* held it utterly immaterial whether the warrant of attorney was known to the surety at the time he entered into the contract or not. The surety had a complete right to the benefit of it; and if the benefit were lost to him, he was at once discharged. The same point was decided in *Capel v. Butler* (*c*), in which, at the time of the contract, there was a mortgage of a ship in the hands of the creditor, who was entitled to sell it and to repay himself out of the produce. The creditor, not putting that in force according to the Navigation Laws, the surety was thereby prejudiced, and was discharged, pro tanto, from

(*a*) See 2 Russ. 384, per Lord *Eldon*.

(*b*) 2 Swanst. 185.

(*c*) 2 S. & S. 457.

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*Judgment.*

the contract and the liability which he had entered into with the creditor. So far, therefore, the case is perfectly clear, and free from all doubt. To complete the question of the obligation as between the surety and creditor, one should further say that the surety has a right, if he indemnify the creditor, to put the creditor in motion at all times against the principal debtor; and it is on that ground that the cases are decided as to giving time. If, therefore, the creditor do any act whatever by which he is prevented from complying with the request of the surety of being put in motion, at any time the surety may think fit, against the principal debtor, that also will discharge the surety, because he has disabled himself from performing what I have here called (adopting the language of Sir *Samuel Romilly*) the implied contract. All that is settled by the decided cases as regards the contract between the surety and creditor is this—the surety has a right, at any moment, to every security held by the creditor at the date of the contract—it has never yet gone beyond that; and he has further a right to say, you must always hold yourself in a position to be put in motion at my request against the principal debtor.

I have gone through the class of cases which have established the principles I have mentioned, before entering into those which approach more doubtful ground, and which must have to be considered in ultimately arriving at a conclusion in this case. Some of the cases seem to have held the rights of the surety somewhat higher, and to have raised some degree of doubt as to the precise and exact position in which the creditor stands with reference to dealings and transactions with the debtor, after the contract of suretyship entered into. I apprehend, all that has yet been established by the authorities, and it is another question to say, whether equitable principles may or may not carry it further, is that, as between the surety and principal debtor,



not one iota of the original contract must be varied. Every right which existed at the date of that contract must be sacredly observed, and there must not be one single transaction in the slightest degree varying the position of the surety with regard to the original liability, without communication with him; because, in the event of any such alteration, however it may be alleged to be for the benefit of the surety, unless it is clearly and undeniably for his benefit, as to which there are some authorities,—it has always been held that the surety is the best judge of what is for his own benefit, and that you must have a communication with him if you wish to vary or depart from the contract. There is an instance of this in the case of *Calvert v. The London Dock Company* (a)—with reference to the performance of a contract it was said, that it was beneficial that the contract should be completed; but the Court held it might operate otherwise, and it was a matter upon which the surety had a right to be consulted.

That being the case as to all rights at the time of entering into the contract, the question that arises in this case is,—what are the sorts of dealings that may take place subsequent to the contract, in respect of matters which did not form a part of the original arrangement, but which may influence the position of the surety; and with regard to that, Lord *Roslyn*, in the case of *Rees v. Berrington* (b), laid down the doctrine in a very broad way, which seems, from the subsequent cases, to have caused some confusion. In *Rees v. Berrington* there was a giving of time, which in effect had operated as a discharge. Lord *Roslyn* says—"The Defendants have put it out of their power to perform that which the nature of the relation between the surety and the person with whom he is bound requires" (c). But, after commenting on the rule, he proceeds to say—"This produces no inconvenience to any one,

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 —  
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(a) 2 Keen, 638.

(b) 2 Ves. jun. 540.

(c) Id. 543.

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for it only amounts to this, that there shall be no transaction with the principal debtor, without acquainting the person who has a great interest in it" (a). It is here laid down broadly and generally, without reference to whether that transaction alters the original contract or not, that there shall be no transaction with the principal debtor without acquainting the surety. Lord *Roslyn* proceeds—"The surety only engages to make good the deficiency. It is the clearest and most evident equity, not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound, and transact *his* affairs (for they are as much his as your own) without consulting him" (a). If that is to be taken in its broadest generality, it will apply to the case now before the Court. It is the case of a transaction with the principal debtor, and it is a transaction which has taken place without consulting the surety; but that this cannot be taken in its absolute generality, is clear from a number of cases since decided: *Perfect v. Musgrave* (b) was not, I believe, cited at the bar, although nearly all the cases were cited. In *Perfect v. Musgrave*, it was attempted by the surety to discharge himself, because the creditor had entered into a subsequent contract, by which he agreed to take 10s. in the pound, but had not discharged the debtor from the original debt. The surety said, 'he ought to have been informed of it.' The Court said it could not possibly, in any way, injure him: he stood as he did at the date of the original contract. If anything, it was done in a such a manner that he could not be affected in any other way than beneficially. Then there are the cases of *T'wopenny v. Young* (c), and *Eyre v. Everett* (d). The latter case goes to a subsequent dealing of this description. A party being bound with the principal debtor to secure the payment of the purchase money of certain shares in a

(a) 2 Ves. jun. 543.

(b) 6 Price, 111.

(c) 3 B. & C. 208.

(d) 2 Russ. 381.

joint stock company to Messrs. *Everett & Co.* the bankers, they afterwards lent the principal debtor a sum of 10,000*l.*, more, I think, than was due upon the original bond, and took a new bond from him for that 10,000*l.* It was attempted to say that the surety was discharged ; but Lord *Eldon* said, there was nothing that prevented the creditors from contracting a new debt with their debtor ; and although in effect, if you are to adopt the precise language of *Rees v. Berrington*, it does materially influence the position of the surety, in this sense, that entering into this new and large engagement is an act of the principal debtor which may lessen the chance of his paying the original debt ; yet Lord *Eldon* in effect said, that it was not any alteration of the contract that existed between them. I think the result of the whole is this—and I have found no case yet that has gone beyond it :—that what you are to take care of is, that the original contract be not disturbed ; that you are not in any way to vary any of the rights that existed at the time the contract was entered into.

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There was another class of cases to which I shall now have to advert, which have some bearing on the question, but I think, when analysed, do not carry the point as high as the Plaintiff wishes to place it in this case. What has arisen in this case is a further security taken for the debt after the original contract. That, of course, is beneficial to the surety ; and then there has been a handing back of that security to the principal debtor. Now, neither the taking of that security, nor the handing it back, in the slightest degree altered the position of the surety under the original contract. The surety did not then contract in any way for the benefit of any future security to be given by the debtor, nor did he contract in any way for any future act between the parties which might alter or discharge his liability. The principles of equity that have been held to apply hitherto have been

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these—that the surety is to have the benefit of all things as they stand, and none of those things is to be varied or altered in the slightest degree whatever. Neither the taking of this further security, nor the giving it back, affected the rights of the party under the original contract.

There is, then, a class of cases affirming this proposition: that, although the security is taken under the original contract, yet if the surety satisfy the creditor his debt, and the creditor has in his hand securities for the debt which have been given him, whether at or after the original contract, the surety then becomes entitled, on paying off the creditor, to stand in the shoes of the creditor and to have the benefit of every security which the creditor then holds. That arises upon a different principle of equity from what may be considered to be the equities under the original contract. It arises, I apprehend, from this, that the party who pays off any person who holds a mortgage or other security, is entitled to have the benefit of all the securities that person so holds in respect of the debt which he has paid off: he has discharged the liability for which the security is held, and he is entitled to call for an assignment from that party of the securities he so holds.

Now, it has been very ably argued by *Mr. Rolt* and *Mr. Smythe*, that there is an engagement as between the surety and the principal debtor, that, if you the principal debtor, at any time hereafter, place securities in the hands of the creditor, I the surety, as against you, am entitled to the benefit of those securities; and therefore you the creditor, knowing that to be my equity against the principal debtor, whenever by any chance you have securities come into your hands, are bound by that knowledge and understanding at the time the contract is entered into, and are bound to retain for my benefit those securities that so come into your hands. It is a nice question, and it is the real question and

difficulty in this case, whether that additional equity will or will not be imported into the contract of suretyship. I do not find that any such case has yet arisen. There is the case of *Wade v. Coope* (a), which is adverse to it: the doctrine there is carefully laid down, as it always has been, by Lord *Eldon*, not following quite so lax a description of the equities as is given by Lord *Roslyn* in *Rees v. Berrington*, but with very careful restriction to its being confined to securities existing at the date of the contract, not, of course, saying that it did not go beyond that, yet always so carefully restricted to that, that, when I find it so carefully guarded on the one hand, and when I also find the case of *Wade v. Coope*, which, if not actually decided upon that doctrine, at least has it distinctly laid down by the Vice-Chancellor of *England*, I do not feel myself bound to extend those principles of equity further than they have hitherto been carried.

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The argument in favour of the discharge of the surety has been very strongly pressed upon me in this way: a supposed case has been put, and it has been said, you get almost to an absurdity, suppose the party, the principal debtor, literally comes and deposits with the creditor a sum of money, and says, "this I will render available for the payment of your debt." It must, of course, always be put on certain conditions, for short of that it is payment, and then the whole case is at an end. If the debt be paid, the surety is discharged by the operation of payment; but suppose the debtor leaves exchequer bills with his creditor, and says "here are the means by which you may at once go into the market and pay yourself," and afterwards those bills are re-delivered: on behalf of the surety it is said, that, where the debtor has approached so near as that to actual payment, it is not in the option of the creditor to relieve him, being then on the

(a) 2 Sim. 155.

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verge of payment, and afterwards to fall back on the surety. Those cases do not put it any higher than the case of a mortgage. It is either payment or security, one or the other, and there is no reasoning applicable to it to be drawn from the case of *Law v. The East India Company* (a), cited by Mr. *Smythe*; when that case is analysed, it appears to be a case of payment. It was the case of a surety to the *East India Company* for the accounting of the principal debtor. The principal debtor died, and on the account being settled, it appeared that the *East India Company* had previously conceived that they (the Company) and not their officer, were the parties indebted; and they had settled an account on that footing, and paid over a balance to him. They subsequently found they had made a mistake, and endeavoured to recover the amount against the surety; and what Lord *Alvanley* held was, that it could not be contended upon any principle that prevails with regard to principal and surety, that, where the principal debtor has left a sufficient fund in the hands of the obligee, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal debtor, the surety can ever be called upon in respect of that sum.

I think the rights with regard to the creditor are so clearly put by Lord *Eldon* in the case of *Wright v. Simpson* (b), that that case affords a better guide for my decision than any of the other authorities that have been referred to. Lord *Eldon* there says, "As to the case of principal and surety, in general cases I never understood that as between the obligee and the surety, there was an obligation of active diligence against the principal. If the obligee begins to sue the principal and afterwards gives time, there the surety has the benefit of it; but the surety is a guarantee; and it is his business to see whether the

(a) 4 Ves. 824.

(b) 6 Ves. 714.

principal pays, and not that of the creditor. The holder of the security, therefore, in general cases, may lay hold of the surety; and till very lately, even in circumstances under which the surety would not have had the same benefit that the creditor would have had. But, in late cases," that is, alluding to cases in bankruptcy, "provided there was no risk, delay, or expense, as in the case put of the money in the next room, indemnifying against the consequences of risk, delay and expense, the surety has a right to call upon the creditor to do the most he can for his benefit; and the later cases have gone further. It is now clear, that, if the surety deposits the money and agrees that the creditor shall be at no expense, he may compel the creditor to prove under a commission of bankruptcy, and give the benefit of an assignment in that way" (a). When one comes to analyse that, what in effect does it amount to? Lord *Eldon* says, the creditor is not bound to prove in bankruptcy, although the debt may be wholly lost by his not proving; he is not bound to prove, unless the surety put him in motion and indemnify him. Nay more, according to the illustration put by Lord *Eldon*, if the money is lying in the next room, the creditor is not obliged to walk into the room and take it, except the surety will indemnify him against the consequences (if there be any) of his performing that act. He is not bound to stir one step in the matter; and I think, when you follow out the principle of that reasoning it is this, that in reality all the surety's right against the creditor is to say, "I claim the right to put you in active motion against the debtor, and until that is done nothing arises between you and me, unless it be something that alters our position under the original contract. If you have obtained a subsequent security from any quarter, and I ask you to proceed actually to enforce that subsequent security, on indemnifying you, you must do it; and if I pay you, you must

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(a) 6 Ves. 734.

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hand over to me that security." Lord *Eldon* puts the case of the creditor beginning to sue and ceasing. That comes rather nearer to the case in question than any other. If the creditor begin to sue and ceases, then the surety is released. But in another case, where *Wright v. Simpson* was cited before Lord *Eldon*, he explained what he had there said, by observing, that, if you begin to sue, you are only doing what the surety could force you to do by the process of indemnifying you, and if you take that on yourself voluntarily you are bound to follow it out (a).

The question is, whether the creditor is liable in respect of laches subsequent to the contract? Now, all the cases that have been cited on the subject of the surety having a right to the subsequent securities, only turn upon this,—that any person paying off a debt has a right to an assignment. The case of *Parsons v. Briddock* (b) has been followed in some subsequent cases. In *Wright v. Morley* (c), Sir *William Grant* cites that case, and says, it is a very strong instance of the application of the equity; and Lord *Eldon*, in *Craythorne v. Swinburne*, entertained no doubt, that, if it had not been from the nature of the contract, which shewed that it was not a security for the same debt, he would have given the benefit of that subsequent security to the surety on his paying off the debt. Then came the case I have lately referred to of *Wade v. Coope*, before the Vice-Chancellor of *England*. There, a sum of 1200*l.* was borrowed, which was intended to be secured originally by the suretyship of three several bonds of 400*l.* each, entered into by the principal debtor and one surety to each bond, but one of the sureties did not concur in that arrangement; however, that point was not argued. No doubt, the other sureties ought to have been discharged on that ground, if it was part of the contract that all the bonds

(a) See *Boulbee v. Stubbs*, 18 Ves. 26.

(b) 2 Vern. 608.

(c) 11 Ves. 12.



should be given, there being only two bonds of 400*l.* each entered into with the principal debtor and a surety. In consequence of a third bond not being given, a mortgage, a year or two afterwards, was entered into by the principal debtor, by which he secured to the creditor the sum of 1000*l.* then due on the account. This security was made in respect of what was due upon the contract. That mortgage for 1000*l.* must have included, and in the Vice-Chancellor's judgment he said it did include, the 400*l.* bond, or part of it, for which *Coope* the surety, who was the Defendant, had entered into the contract of suretyship. After that a second mortgage was made of this property by the original mortgagor and the principal debtor. Then the party who was the creditor, holding the first mortgage as a security for his debt, sued *Coope* in respect of his 400*l.* bond, and recovered the 400*l.*; and then *Coope* (in another suit in which he failed in getting an injunction and had to pay the 400*l.* bond) obtained permission to pay off the residue of the debt due on the mortgage, which was 600*l.* and odd, and having paid that residue, he got an assignment of the mortgage. It is not, as Mr. *Smythe* put it, that he was trying to tack this bond to the mortgage. The 400*l.*, which was an original part of the security for 1200*l.*, had been recovered at law against *Coope*. What he does in effect is this,—he pays off 400*l.*, part of the mortgage, and obtains leave to pay off the remainder and take an assignment of the whole. It was not precisely the case of tacking the bond to the mortgage. He says, as against the party entitled to the second mortgage, 'I come in in priority to you, although you obtained your second mortgage prior to my having paid off my bond, and to my having obtained power to have the mortgage debt assigned to me.' Of course, he was entitled to the mortgage. As to the portion of the 600*l.* which remained, there was no question; the question was, whether he was entitled to the 400*l.* The 400*l.* was literally a part of the debt secured by the mortgage, and the Vice-Chan-

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cellor held, on two grounds, that the Defendant was not entitled to the equity. The Vice-Chancellor said, he never knew an instance in which a party, being a surety for a debt, and a mortgage being given for another debt of which that was a part and not the whole, was entitled to the benefit of the security. Whether he be so entitled or not, may be open to question. He held further, that there was no instance in which, where the security was given subsequent to the debt, the party had a right to insist on the equity. I think it very possible, if that case comes to be sifted, the latter ground will be held the more tenable of the two. The Vice-Chancellor did in effect distinctly decide that the position of the surety was this, that he cannot, prior to payment, insist on any rights as vested in himself. No doubt, if he had paid off the 400*l.* and had got an assignment before any subsequent mortgage was made, the question would not have arisen. What I apprehend as really the result of all these cases is this:—You, the surety, may assert your rights actively whenever you please. When you assert them actively, the creditor will be obliged to hand over to you, on your paying him, all the securities he holds undisposed of. If they are securities held at the date of the original contract, you will be entitled to them absolutely, because it is a part of the original contract that your position shall not be altered. If they are subsequent, then your right and equity only arise from the time of your putting yourself in active motion, and not before.

There was another case cited to me, which was before the Vice-Chancellor of *England*, which I candidly confess I feel great difficulty in comprehending: that is the case of *Williams v. Owen* (a). There was an actually existing contract for a mortgage at the time the contract of suretyship was entered into, and after that the principal debtor

(a) 13 Sim. 597.

entered into a contract to give the creditor an additional charge upon that security, which of course, therefore, damaged that security to the extent of the additional charge; and yet it was held that the creditor had a right to hold that additional charge against the surety paying off the debt. But, if the principles settled in *Mayhew v. Crickett* and *Capel v. Butler* are correct, I should have thought the securities at the date of the original contract ought not to be altered in any way between the principal debtor and the surety. The Vice-Chancellor puts the case of *Williams v. Owen* on grounds which may sustain it—on the actual form of the instrument, and it may rest upon this—that the surety was privy to the whole transaction and did not specially contract that there should be no further charge; he did not specially contract that that mortgage should not be altered; and the Vice-Chancellor, if I might venture to express my notion of what fell from him, though it is not so clearly stated as he was usually in the habit of doing, seems to have thought that the express contract he was looking at amounted to a waiver of the implied contract of suretyship. If so, I can understand the decision of the case: if it were otherwise it certainly seems distinctly opposed to *Mayhew v. Crickett*.

I have thought it necessary to go so much at length in this case, because I think it desirable that the grounds of my decision should be fully explained in a case of some novelty. It has never yet been held, that a party entering into a contract of suretyship places himself in such a position, with regard to the principal debtor, as to entitle him to say to the creditor, I have a right to all securities, past, present, or to come, against the principal debtor: whenever you find yourself in the position of holding securities, hold them for my benefit,—you are not to damage me by any dealing with them. It has not been so held; and *Wade v. Coope* is an authority the other way. I am, therefore, of opinion that I cannot grant the injunction.

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# THE EARL OF LINDSEY v. THE GREAT NORTHERN RAILWAY COMPANY.

**T**HIS was a motion for an injunction to restrain the Defendants from allowing any of their trains to pass the station. A landowner, being a peer of Parliament, entered into an agreement with the projectors of a railway, stipulating, among other things, that they should take certain portions of his land, and pay him certain specified sums for the same, and by way of compensation for permanent injury to his mansion and estate; that they should execute certain works of utility and ornament on his property, and make and maintain a station adjoining or near to a particular road, at which all trains passing along the railway should stop for the accommodation of passengers, and for the receiving and unloading of goods, luggage, carriages, and horses; with a provision that the landowner should withdraw his opposition to the bill of the projectors, and co-operate with them and use his best endeavours to prevent the bill of a rival company from passing into a law; but that, if the bill of the rival company should pass, then the first-mentioned company should pay the Plaintiff certain sums for the land the rival company might take, and recover from the latter and pay to the first-mentioned company the largest amount of price and compensation which could be obtained; and a provision that either of the parties might determine the agreement by notice to the other if the bill of the first-mentioned company should not pass within six months; and a further provision, that, if the two projected companies should be amalgamated, the amalgamated company should pay certain sums to the Plaintiff as purchase money and compensation; and that the covenants and agreements concerning the purchase and taking of land, not making deviations without the Plaintiff's consent, and the making and maintaining such station, and all other the covenants and agreements thereinbefore contained on the part of the first-mentioned company, so far as the same should be applicable, should be performed by the amalgamated companies. By an Act, passed within six months, the subscribers to the two projected companies were incorporated in one body, and authorised to make certain of the projected lines of railway; and it was enacted, that the shareholders of each company should be entitled in certain rates or proportions to the shares of the united company. It was held by the House of Lords, affirming the judgment of the Exchequer Chamber (which reversed that of the Court of Exchequer), that, notwithstanding the bill of the first-mentioned company did not pass, the agreement could not be determined by a notice given by the projectors who were parties to the agreement, or by the amalgamated body. The amalgamated company having then taken the land referred to in the agreement, and paid for it the price thereby stipulated, and having, in a suit in equity brought against them by the landowner, claimed the benefit of the agreement, he filed his bill for a specific performance of his contract with the projectors of the first-mentioned company, and moved for an injunction to restrain the incorporated company from permitting any of their trains to pass a certain station near the road mentioned in the agreement without stopping thereat for the accommodation of passengers, &c.:—*Held*, that the union and incorporation of the shareholders of the two companies in one body, and the consolidation of their several shares under the Act of Parliament, constituted an amalgamation within the meaning of the agreement.

That the amalgamated company was bound by the agreement entered into with the Plaintiff by the projectors of the first-mentioned company.

That there was no objection to the agreement in point of legality, with reference to the position of the Plaintiff as a member of the legislature; and that, especially after the agreement had been the subject of consideration and construction in the House of Lords and in the Court of Queen's Bench, this Court would not refuse to enforce it on any suggestion of illegality.

That the Plaintiff was therefore entitled to the injunction, and,—under the circumstances of the case, upon the interlocutory application,—before the hearing of the cause.

tion called the *Tallington* station of the *Great Northern* Railway without stopping thereat for the accommodation of passengers and to receive and unload goods, luggage, and carriages and horses.

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should pay to the Plaintiff the sum of 25,000*l.* in compensation of the permanent injury to his mansion and estate, and as the purchase money of the land described in the plan, amounting to 20*a.* 3*r.* 24*p.*, or thereabouts; with a provision for an abatement of 5000*l.* if an Act of Parliament should be obtained within the three years, for varying the line through the Plaintiff's estates in the manner therein indicated; that the company should pay the Plaintiff 300*l.* per acre for any additional quantity of land they might require and take, beyond the 20*a.* 3*r.* 24*p.*, but should not exercise any of their powers to compel or enforce the sale by the Plaintiff of any such additional quantity of land, nor should the company make any deviation from their line through the Plaintiff's estate without his consent. That, in the event of their bill passing, the *Direct Northern Company* should make all such bridges, viaducts, walls, fences, and other works, as should be necessary for preserving the communication between the parts which should be severed by the railway of the Plaintiff's estate, and for the convenience, accommodation, and security of the Plaintiff and his tenants, and of the said several lands, in such manner as the agents of the Plaintiff and the company (therein named), or, in case of their disagreement, an umpire to be appointed by them should require and direct, and should at all times thereafter maintain the said bridges, viaducts, walls, fences, and other works in all needful repairs, and also make and at all times thereafter maintain a station at some point to be approved of by the Plaintiff, adjoining or near to the road from *Stamford to Deeping*, at which station all trains passing along the said railway should stop, for the accommodation of passengers, and for receiving and unloading of goods, luggage, and carriages and horses. Then followed many other provisions, whereby the company were to provide a sufficient police force during the execution of the works, contribute towards the deviation of a road, erect a brick wall, park

gates and lodges, plant the bankside of the railway with ornamental shrubs and trees, not to erect any steam-engine or foundry on land taken from the Plaintiff's then estate, or within 300 yards thereof; and that, in consideration of the foregoing covenants, the Plaintiff should not prefer his petition against the said bill so introduced for empowering the said *Direct Northern* Company to make their proposed railway, but as a landowner would assent to the same being passed: and the Plaintiff should forthwith, or as soon as might be, prefer and prosecute, as a landowner, a petition or petitions against the said bill so introduced into the House of Commons, for empowering the *Great Northern* Company to make their proposed railway from *London* to *York*, with a certain branch therefrom, in the different stages of the said bill, as well through the House of Commons and also through the House of Lords; and for such purpose should, as such landowner, co-operate with the said *Direct Northern* Company in all necessary proceedings for making a complete opposition to the same bill; and should and would use his best endeavours and co-operate with the said *Direct Northern* Company as aforesaid, to prevent the same from being passed; that in case, nevertheless, the said *Great Northern* Railway bill should pass into a law at any time before the expiration of eighteen months, to be computed from the date of the agreement, the *Direct Northern* Company should, within three months next after the passing of the said bill into a law, and whether or not any deviation or alteration should be made or be agreed or intended to be made of the line of the proposed railway from *London* to *York*, with or without such branch, pay unto the Plaintiff, his executors, administrators, and assigns, the sum of money following; that is to say, in case the *Great Northern* Company should be by such Act empowered to make the railway from *London* to *York*, with such branch railway therefrom to or near the town of *Stamford*, then the sum of

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15,000*l.*, or in case the said company should be empowered to make the railway from *London to York*, but without such branch railway, then the sum of 5,000*l.*, such sums respectively to be compensation for the permanent injury to be occasioned to the said mansion and estate, and for the purchase of the land of the said Plaintiff to be required by the *Great Northern Company*, amounting together to 19*a.* 3*r.* 11*p.*, or 9*a.* 2*p.* without such branch railway; and the said *Direct Northern Company* should also pull down and remove the farmhouse and other buildings of the said Plaintiff at *Tallington*, immediately adjoining the main line of the intended railway, and rebuild the same on such other site or sites as the said Plaintiff should think proper and direct, to the satisfaction of his surveyors, or should pay to the Plaintiff the sum of 2,000*l.* to enable him and them to remove and rebuild the said farmhouse and buildings: That in case a greater quantity of land of the Plaintiff should be required and taken by the *Great Northern Company* under the powers to be vested in them by such Act than the said quantities, then the *Direct Northern Company* should pay to the said Plaintiff for such additional quantity of land after the rate of 300*l.* per acre: That, in the event of the last-mentioned bill passing, the Plaintiff should use his best endeavours to recover from the *Great Northern Company* the largest price which could be reasonably obtained by way of compensation for the permanent injury to be occasioned to the said mansion and estate by their said railway, and for the purchase of the land of the Plaintiff, which shall be required for or on account of their said railway: and the Plaintiff should pay unto the said *Direct Northern Company* such sums as should be so recovered. There were then various provisions which are not material to this case, and provisions for the termination of the agreement by either party upon notice to the other, if no bill authorising the *Direct Northern Company* to make the railway from *London to York*,



should be passed within six months from the date of the agreement; and the agreement then provided, that, in case of the amalgamation of the *Direct Northern* and the *Great Northern* Companies, the amalgamated company should pay to the Plaintiff the several sums of money, for purchase and compensation in respect of the lands which they should take, as therein provided, and which, if the railway of the amalgamated company should follow the intended line of the *Great Northern* Railway, should be 6000*l.*; and in such case the several covenants and agreements therein contained, touching and concerning the purchase and taking of additional land, and the re-sale to the Plaintiff of land not required for the purpose of the railway, and in respect of the not making deviations without the consent in writing of the Plaintiff, and touching the making and maintaining of the viaducts, bridges, and other works of convenience, security, and accommodation, and the making and maintaining of such station, and the maintaining of such sufficient police force as respectively aforesaid, and all other the covenants and agreements thereinbefore contained on the part of the intended *Direct Northern* Company, so far as the same should be applicable, should extend to and be observed and performed by the said amalgamated companies.

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The two companies were amalgamated by the Act 9 & 10 Vict. c. lxxi. (Loc. & Per.) (a), which received the Royal Assent on the 26th of June, 1846. The amalgamated company was incorporated by the name of the *Great Northern* Railway Company. The amalgamated company passed through the Plaintiff's estate, on the line of the *Great Northern* Company without the branch to *Stamford*, and required only 9*a.* 0*r.* 2*p.* of his land. On the 25th of November, 1846, the *Great Northern* Company served the

(a) *Great Northern* Railway Act, 1846.

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Plaintiff with a notice to determine the agreement. They refused to pay the 6000*l.* stipulated by the agreement; and the Plaintiff, at the expiration of three months from the time of the amalgamation, brought his action against the parties to the agreement of the first part for that sum. The Defendants to the action pleaded, that no Act of Parliament authorising the *Direct Northern* Company to make their railway passed within the six months; and also, that, on the 23rd of November, 1846, they served the notice, and thereby determined the agreement. The Plaintiff demurred to the plea. The case was finally decided by the House of Lords, on the 2nd of June, 1851 (*a*); and the *Great Northern* Company then paid the Plaintiff the 6000*l.* for the 9*a.* Or. 2*p.* of land, with interest and costs. Various other proceedings took place, including a suit by the Plaintiff for an injunction to restrain them from taking additional land: these, so far as they are material to this case, are adverted to in the judgment.

In June, 1852, the Plaintiff's solicitor, having heard that the railway was about to be opened, wrote to the company's solicitors, stating that the Plaintiff would require all the trains to stop at *Tallington*; to which the company's solicitors replied, by denying that the company were, according to the proper construction of the agreement of the 16th of March, 1846, bound to stop all the trains at the *Tallington* station.

The bill, which was filed only a few days before the motion was made, prayed a specific performance of the agreement of the 16th of March, 1846, in all such particulars as the *Great Northern* Company had not performed the same; and, among others, praying a specific perform-

(*a*) See *Earl of Lindsey v. Capper*, 1 Exch. 579; 2 Id. 801; 3 H. L. Cas. 293, *S. C.*

ance of the agreement for stopping the trains at the station at *Tallington*, and for an injunction in the meantime, in the terms of the present application.

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Mr. *Rolt*, Mr. *Follett*, and Mr. *C. Hall*, for the Plaintiff.

*Argument.*

The *Solicitor-General*, Mr. *Wigram*, and Mr. *Denison*, for the Defendants.

VICE-CHANCELLOR.—Upon the point of the illegality of the agreement, I think, after what has taken place in the House of Lords, and after the whole of the agreement has been before them, I cannot enter into that question. Upon the second question, with regard to the amalgamation, looking to the construction of the Act, I cannot doubt that the two companies have been amalgamated, and that the amalgamation has been completed under the 4th and 6th sections(a); although I quite accede to what was said on behalf of the Defendants, that the decision of the House of

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(a) The 4th section of the 9 & 10 Vict. cap. lxxi. (Loc. & Pers.) enacted, That Wm. Astell, and eighteen other persons therein named, and all other persons and corporations who have already subscribed to the undertaking called the "The London and York Railway," and all persons and corporations who had already subscribed to the undertaking called "The Direct Northern Railway," and all persons and corporations who should thereafter subscribe to the undertaking thereby authorised, and the executors, &c., should be incorporated by the name of "The

Great Northern Railway Company."

The 6th section enacted, That the number of shares should be 224,000, and the amount of each share 25*l.*; and that, as respected the persons and corporations who had already subscribed to the respective undertakings called "The London and York Railway," and "The Direct Northern Railway," every person, &c., who had subscribed one or more sums of 50*l.* to "The London and York Railway," should be entitled to one share of 25*l.* in the incorporated Company for every sum of 50*l.* so sub-

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Lords does not determine that as a matter of fact, and that, from the nature of the question before them, it was admitted the point did not arise for their decision ; yet, I have no doubt, that is the effect of the Act of Parliament. And, thirdly, I do not feel any doubt as to the construction of the word "station." There is an agreement that there shall be "a station at some point, to be approved of by the said Plaintiff, adjoining or near to the road from *Stamford* to *Deeping*, at which station all trains passing along the said railway shall stop, for the accommodation of passengers, and for the receiving and unloading of goods, luggage, and carriages and horses." You must necessarily construe the subsequent clause in one of two ways. The words are, that, in case of the amalgamation, "the several covenants and agreements touching the" — "making and maintaining of such station" — "and all other the covenants and agreements hereinbefore contained on the part of the said intended *Direct Northern Railway Company*, so far as the same shall be applicable, shall extend to and be observed and performed by the said amalgamated companies." Either the words "such station" must be taken to include the whole previous description of the station, including the stopping of all trains, as part of that description ; or, if you read the words "at which station all trains passing along the said railway shall stop" as another and a separate covenant, then it will fall under the latter branch of the subsequent clause, which includes "all other agreements and covenants" thereinbefore contained, so far as the same may be applicable. If there is to be a station, that might be a covenant applicable to the station ; and I do not think it is or can be said, when a person has stipu-

scribed, and every person, &c., who had subscribed for three or more sums of 25*l.* to "The *Direct Northern Railway*," should be

entitled to two of the said shares in the incorporated Company for every three sums of 25*l.* so subscribed.

lated that he shall have a stopping-place within three-quarters of a mile of his residence, and that all trains shall stop there, that, because the stopping-place is carried two miles from his residence, that is such a change as to render this portion of the agreement inapplicable. In fact, the whole of the clause contemplates the formation of the line as it now is.

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The remaining points are—how far, notwithstanding all the Acts which have passed, it is in effect made out that this is a binding agreement upon the *Great Northern* Company; and the question as to the time which elapsed between the letter to the solicitors of the company, of June, 1852, and the time of this application, with reference to the nature of the injury, this being an interlocutory application for an injunction—I am quite aware that there is no probability of any new light breaking in upon the case; but unless the parties agree, it cannot in the present stage be treated as a hearing of the cause.

Mr. *Rolt* replied.

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VICE-CHANCELLOR:—

The Plaintiff founds his right to the injunction which he asks, upon an agreement entered into by him on the 16th of March, 1846, with a gentleman of the name of *Capper* and ten other parties, who were at that time a body of provisional directors, promoting a railway called the *Direct Northern* Railway. Several questions have arisen with reference to the right of the Plaintiff to insist on this agreement as regards the present Defendants. Some of the questions I disposed of at the hearing, before the reply, and others of them I think admit of very little difficulty. But the main and most material question is that which I shall first consider, namely, how far this agreement is an agree-

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ment binding, under the circumstances of this particular case, on the *Great Northern Railway Company*.

Now, upon the construction of this agreement, no doubt a question arises of some novelty and importance, considering the terms of this agreement as compared with the agreements which are found in other cases hitherto decided by the Court. In order to understand exactly the nature of the agreement, one must consider what the exact position of Lord *Lindsey* was—Two railways were projected from *London* towards the *North of England*, both of which were to pass through his estates; one called the *Direct Northern*, the other called the *London and York*, which afterwards assumed, as appears on the face of the agreement, the name of the *Great Northern Railway*. Both these railways passed through his property; but one of them, the *Direct Northern*, in a way that was more injurious to him than that proposed by the *London and York*; the *Direct Northern* would come within a few hundred yards of his residence, would take a considerably greater quantity of his land, would have a station within three or four hundred yards of his house, and in many other respects would much more seriously inconvenience him than the railway proposed by the *London and York Company*; but the *London and York Company* would also take in one event, namely, if they procured authority to make, as well as their direct railway, the branch to *Stamford*, about nineteen acres of the Plaintiff's land; and, if they did not procure authority to make that branch, about nine acres. And I think it appears plainly on the face of the agreement, that in one sense the plaintiff was opposed to both the railways, that is, he was opposed to their taking his land under the usual compulsory powers contained in Railway Acts; but not opposed either to one or other, if compensation should be made by way of agreement, by which he might be secured against the

inconvenience of the exercise of those powers through the intervention of a jury; and one mode, perhaps the usual mode adopted in these cases, would have been to present a petition, or to threaten to present a petition against each of the different railway companies, in order to secure to himself terms by which he might be protected against the summary exercise of these compulsory powers. However, he seems to have adopted a course which appeared to him to have answered his purpose equally well, of treating with that company which more directly and immediately affected his comfort and property, and as to the operations of which it was most important he should guard himself; and the treaty he entered into was of this nature:—He seems to have considered that they might occupy two different positions,—the one which they actually occupied at the time of his agreement, and which placed him in antagonism to the *Direct Northern Company*; and the other, the position which they might possibly ultimately assume, looking to the course of practice which had frequently taken place for at least ten years before the passing of these Acts of Parliament, of combining the two different sets of parties promoting the railway into one body,—a process called amalgamation: looking to that tendency, he also thought, that, by this agreement, he must endeavour to guard himself against the consequences which might arise from such a change in the position of the *Direct Northern Company*, and he made the following arrangement: he entered into a contract with Mr. *Capper* and ten other directors of the *Great Northern Company*, whose line came nearest to his residence; and by that agreement, in the first part of it, he provides that he will withdraw his opposition to their bill; and that, if they succeed in passing their bill, they shall pay him 25,000*l.*, to be moderated to 20,000*l.* on certain contingencies; that they shall secure the comforts of his property by erecting a wall round his park, and executing other works; and more particularly, that they shall, as some compensation for the

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inconvenience he may suffer, take care to provide a station on the road from *Stamford* to *Deeping*, at which station all trains shall stop for the accommodation of passengers, in the words in which it is now sought by the present motion to carry into effect the agreement. That was the stipulation he made in the event of their railway being made. Further than that, he said: "I also am adverse to the taking of my land by the *Great Northern Railway Company* at a jury price." That is the effect of the agreement. "What I want, if the *Great Northern Railway Act* passes, is this—I am willing to let them have my nineteen acres of land, or nine acres of land; but, if they take the nineteen acres of land, they shall pay a certain specified price;—if they take the nine acres of land, by giving up the branch railway to *Stamford*, they shall pay 5,000*l.*, that is to say, I want to obtain, as the price of that land, 5,000*l.* I want further (it is said that this is a part of the original agreement with the *Direct Northern Company*.) to have a certain farmhouse near *Tallington* removed, and it will cost about 2,000*l.* to do that; and I will either have it carried back and put into a new position, or have 2,000*l.* to enable me to achieve that object." The Plaintiff, therefore, says, "What I will do is this,—instead of my presenting a petition, standing on independent grounds, and acting on my own behalf, against the *Great Northern Railway Company*, I will engage with you, the *Direct Northern Railway Company*, that if you indemnify me to the full extent that I should seek indemnification in case of my success against the *Great Northern Company*, then I will present a petition against the passing of their proposed Act; you shall bear the whole expense of that petition; you shall take, in fact, the whole matter into your hands; you shall undertake a sort of agency on my behalf in reference to my opposition to that company; and you shall pay me what I should require in case I should enter into a contract with them, namely, you shall pay me



5,000*l.* and 2,000*l.* if they have the nine acres, and the larger sum if they take the nineteen acres; and, when that is done, I will undertake on my part, if the bill passes in spite of my opposition, to recover from them all that the law will give me by the intervention of a jury as against them; but, you having indemnified me, I shall hand over to you the money which I may so recover." That was the scheme as to the antagonistic position of the two companies. But then it occurred to the Plaintiff: "You may perhaps unite,—you may amalgamate with the other company; and what I want then is, indemnity again. I do not want to be drawn before a jury. I do not want to have an Act of Parliament which shall enable this amalgamated and new company, by the exercise of its summary powers, to obtain possession of my land at such a price as a jury may give; and, therefore, I stipulate that you, the *Direct Northern Company*, in that second position of affairs, namely, if you choose to unite with the other company, and to carry a line jointly with them, (to which I have no objection), that you do in that case pay me the larger sum for the nineteen acres, and the sum of 6,000*l.* for the nine acres; and that the amalgamated company shall also give me the station, and keep the other covenants which are provided for in my engagement with the *Direct Northern Company* in case the bill should pass. I am not at this moment considering what the effect of that provision is with regard to giving the same station and keeping the same covenants: that is a matter to be considered afterwards.

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The whole scope of the agreement takes, as I before stated, a twofold aspect,—“if you carry your own line, or try to carry your own line, then you shall act for me in opposing the *Great Northern* line, and in trying to do your best to enable me to get the terms from the *Great Northern*; if I do not get them, you shall pay me the terms I am disposed to take; and I must pay you back anything I recover

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from the *Great Northern* in consequence; and if the companies unite, then the other course must be taken." This agreement, therefore, is different from any other agreement which appears to have been made in any of the cases referred to, or in any other case that I can find. I do not find any case in which, upon the agreement itself with one company, there is contemplated the possibility of that company entering into a new arrangement, by which they are to become amalgamated with another, and providing for that contingency.

Now, if there had been contained in this agreement an express covenant by Lord *Lindsey*, that, in the event of the Companies wishing to amalgamate, he would not oppose that amalgamated bill, provided the stipulated terms were given him, I think the case would hardly have admitted of any argument. Then, the Plaintiff would have simply said this—"As long as you are acting as promoters of the railway *A*, I agree with you on certain terms. If you become together promoters of railway *B*, I will covenant not to oppose it, provided you, as promoters in common with others of the new railway, give me these terms." If there had been an express covenant to that effect, it would have been nothing more than the simple agreement between the Plaintiff and the promoters of a projected railway, or some of them, saying he would not oppose their scheme, provided they gave him the terms in question. There is no such direct covenant here; but it seems to me, that, upon the face of the agreement, it would be unquestionably implied that this is an agreement by which Lord *Lindsey* has said, if you amalgamate, the united or amalgamated company is to pay me for this quantity of land, and perform these covenants; and then looking to the previous part of the agreement, as to the opposition to the *Great Northern* Company, —all of which opposition, being placed in the hands of the *Direct Northern* Company, made them his agents in that

respect—they were to pay the expense of it and conduct it; I think this clause coming afterwards, and providing what was to be done in the case of the amalgamated company, would amount to an agreement on the part of Lord *Lindsey* to let the amalgamated company's Act also pass on the terms provided by the stipulations contained in the last part of the agreement. If so, then, the case would be reduced strictly within the principle of *Edwards v. The Grand Junction Railway Company (a)*.

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In considering what the principle of *Edwards v. The Grand Junction Railway Company* was, it was said by the *Solicitor-General*, and I think, having had time now to look through the whole of the authorities, it was correctly stated, that Lord *Cottenham* rested the relief which he there gave, not on the principle of contract by means of the agency of a promoter, as the agent for non-existing body, so as to bind a body that had not then acquired a corporate capacity, after it should acquire such corporate capacity, by an arrangement made by a person who was not authorised under seal: that was not the principle on which Lord *Cottenham* proceeded; but the principle, as stated by Lord *Cottenham* himself, seems to have been this, (and I find it more clearly stated in another case which unfortunately I have forgotten the reference to), he says, referring to *Edwards v. The Grand Junction Railway Company*, "I did not put it precisely on the contract; but what I did put it on was this, that, if a party enters into an agreement, by the means and operation of which a body is afterwards incorporated and brought into existence and acquires powers, I will not allow that company to exercise powers

The decision in the case of *Edwards v. The Grand Junction Railway Company* did not proceed on the principle that the incorporated company was bound by the contract of a party acting as an agent for them prior to their corporate existence, but on the principle, that the Court would not allow them to exercise powers acquired by means of such contract without carrying it into full effect; and, in the absence of any adoption of the contract of such a party by the incorporated company, or of any

attempt to exercise the powers thereby acquired, or of any part performance, the Court might refuse to enforce specific performance of such a contract against the incorporated company; but if they adopt or avail themselves of the contract, or exercise the powers acquired by its means, the Court will, in that case, not only negatively but positively, interpose and compel the performance by them of every portion of the contract.

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acquired through the medium of that previous contract and arrangement, without carrying that contract and arrangement into full effect;" and as the *Solicitor-General* says, it is an act of the Court operating negatively rather than positively. So that, unless *Hawkes v. The Eastern Counties Railway Company*(a) be an exception, which I hardly think it is, there being there a contract under seal, I do not know that there can be found in the books any case in which, upon a previous agreement being entered into by parties promoting and opposing a railway, the Railway Act then passing, and nothing more being done, the railway company not attempting the exercise of any power it has so acquired, that, in that state of things, there has been a specific performance of the contract so entered into. What Lord *Cottenham* fastens on is this. He says: "If you acquire powers through the medium of the contract so entered into by any one who at the time was promoting that measure of which you afterwards reaped the benefit, you shall not exercise any one of those powers without giving full effect to all the arrangements and agreements of that party,"—agent he cannot be called. But the result of that doctrine goes further than the *Solicitor-General* urged, for he would rather have placed it in this position: He said, you can only negatively restrain certain acts from being done; you cannot positively enforce the performance of any acts to be done. I apprehend the doctrine goes to this extent. It is, in one sense, negative; that is to say, the Court will not interpose by this species of jurisdiction, unless you, the company, are availing yourselves of certain powers which you have thus acquired; but that preliminary condition of interference having once taken effect, you having asserted and exercised those powers, all the other consequences follow positively, and you shall perform every branch and portion of your agreement, and not be merely

(a) 7 Railw. Cas. 188.

negatively restrained from doing acts which, in another sense, are contrary to that agreement; or, in other words, to take *Lord Petre's case* (a), you agree with the landowner, that, upon his withdrawing his opposition, you will pay him 120,000*l.* as the value of his land; if you, the railway company never bring your power into operation at all,—if you let the Act be abandoned, and take no step whatever, in consequence of finding, perhaps, that you are fettered by such an engagement, a Court of Equity might possibly say, that the landowner cannot enforce any portion of that agreement; but the moment they made a railway through his land, that moment the contract took full effect. It was not merely the stipulation that they should have a station at a certain place that would be enforced, but the Court would enforce directly the specific contract to give the landowner the 120,000*l.*, which in effect, by the result of that litigation, he did obtain. What Lord Cottenham says, in *Edwards v. The Grand Junction Railway Company*, is this: “The question is, not whether there be any binding contract at law, but whether this Court will permit the company to use their powers under the Act in direct opposition to the arrangement made with the trustees prior to the Act, upon the faith of which they were permitted to obtain such powers.” If the company and the projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of, all that the projectors had before. They are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and, in prosecution of it, had entered into arrangements, and then had sold and assigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser; but in this Court it would be otherwise. So here, as the company stand in the place of the

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(a) 1 Railw. Ca. 462.

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projectors, they cannot repudiate arrangements into which such projectors had entered. They cannot exercise the powers given by Parliament to such projectors in their corporate capacity, and, at the same time, refuse to comply with those terms upon the faith of which all opposition to their obtaining such powers was withheld (a). And that I apprehend to be the true doctrine on which these cases must proceed.

There have been two or three cases of amalgamated companies before the Court. In none of them, however, did the original stipulation in the contract itself provide for that event. One of those cases was *Stanley v. The Chester and Birkenhead Railway Company* (b). In that case, the Plaintiff entered into an agreement with company A. for a certain price in respect of his land, of which fourteen acres would be taken; and then company B., who would take by their Act sixteen acres of his land, went before Parliament for their line. He did not oppose that line; but the committee of the House of Commons compelled these two companies to unite and embody themselves, or, as it is called, amalgamate into one company; and when they are so amalgamated, the two projectors meet and sign an agreement, to the effect that this company shall so proceed. Sir *Thomas Stanley*, the Plaintiff, was asked also to sign a similar agreement. No doubt, therefore, there was in effect a contract by him not to oppose the amalgamated line. If that contract existed here, I should not have felt that this case presented any serious doubt or difficulty. He covenanted not to oppose the amalgamated line, and filed his bill to make the new company liable to the original contract, as to which there had been no provision in the contract with the projectors of the company A., but simply on the ground of having appeared before the com-

(a) 1 My. & Cr. 672, 673.

(b) 3 Id. 773.

mittee and consented to that line. He filed his bill to transfer the liability created by the whole of the arrangement to the amalgamated company *A.* and *B.* Lord *Cottenham*, on demurrer, held, that he was justified in so doing; and he said, that it would be monstrous, in that state of things, when he had given in his adherence to the new line, to suppose that he had given it under any other circumstances than those of having entered into a contract with one-half of the promoters of that line at least, by which he was to be secured in the manner he proposed.

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Another case was *Greenhalgh v. The Manchester and Birmingham Railway Company*(a), before the Vice-Chancellor of *England*. That was a very peculiar case. There again there was no prospective contract for the amalgamated company; but what happened was this: the Plaintiff had contracted with company *A.*, and there was a power preserved to company *A.*, if this bill did not pass within a certain limited time, to give notice and put an end to the contract. After that, they united or amalgamated with company *B.*; and company *B.* agree to take all the contracts of company *A.* I do not think in substance it will be found that those agreements very much alter the position of the parties. However, they agreed to take all the contracts of company *B.*, and notice is given to the Plaintiff of that contract. The Vice-Chancellor held, (and some observations of his were cited as having a more particular reference to another branch of this case), that, looking to the different nature of the two companies, namely, that railway *A.* created serious and enormous damage to the Plaintiff, whereas, railway *B.* only took a corner of his land, he could not import the agreement with company *A.* into the agreement with the united company; that the two com-

(a) 9 Sim. 416; 3 My. & Cr. 784.

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panies were entirely separate; and that, therefore, upon notice given by the company A., when their bill did not pass—which was the event—the agreement was wholly at an end. I may observe, in passing, that the observations of the Vice-Chancellor as to the effect of the improbability of its being intended that the amalgamated line should be bound by the agreement in consequence of the very different mode in which the Plaintiff's land would be affected, cannot have any application here; because the contract expressly provides for the very event. It is impossible for the Court to say that was not in contemplation, when it finds the fact of amalgamation contemplated, and provision made for every thing which is to be done in respect of it. In *Greenhalgh v. The Manchester and Birmingham Railway Company*, there was no such provision. When it came before Lord *Cottenham*, he did not apparently concur with the Vice-Chancellor as to the liability of the amalgamated company. He said, he considered it a nice and difficult question—one not to be decided unless it was necessary to decide it; and he was glad that he could decide it on another ground, namely, the delay and acquiescence on the part of the Plaintiff, upon which ground he affirmed the order refusing the injunction.

Besides these cases, there has been a case before the present Lord Chancellor which was not cited, but which has considerable bearing upon the particular point now before the Court, that is the case of *Preston v. The Liverpool, Manchester, and Newcastle-upon-Tyne Junction Railway Company* (a). That case was on demurrer. The Plaintiff in that case made with company A. an independent agreement, not contemplating any future amalgamation, and certain sums were to be paid for such land as

(a) 1 Sim. N. S. 586.



the company might require. It is one of those cases which involve that question also. They were to pay also certain costs. Afterwards the company *A.* again, as in the other case, amalgamated with company *B.* It was stated in the bill that the two companies had agreed to adopt the agreements each of the other; but it was not stated in the bill that notice was given to the Plaintiff of that agreement between them; and, therefore, I apprehend that the Plaintiff could hardly be heard to say he could derive any benefit from the agreement between the two companies. That was a matter of arrangement between themselves; it was not a matter which distinctly affected the Plaintiff. In that state of things, a demurrer was put in, and supported by the *Solicitor-General* with very much the same arguments that have been urged before me on the present occasion. He argued, that "a contract entered into on behalf of a company before it came into existence, had never been held to be binding upon the company, unless it had taken the benefit of the contract after its incorporation; that the agreement sought to be enforced was purely executory, and was not intended to be binding even upon the contemplated company, unless that company not only obtained an Act of incorporation, but required and took possession of the Plaintiff's land." That was the second point in the case,—as to taking possession. "That if, under the circumstances of the case, the incorporated company should be held to represent the contemplated one, and the agreement should be held to have been entered into on its behalf, still it had never adopted the agreement." Now, what Lord *Cranworth* says is this: He mentions the agreement of the Plaintiff with the parties promoting the first line, and the formation of the second line; and that the parties afterwards coalesced, and agreed to concur in obtaining an Act of Parliament, which should adopt part of the line which traversed the Plaintiff's land. He refers to the

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other agreement, which adopted the original contract; and then he says: "The same persons who entered into the agreement as projectors"—and this, I think, is important, as bearing on the present case—"also obtained the Act which passed; others, it is true, concurred with them; and the name of the company was changed. But in substance, as far as the Plaintiff was concerned, that made no difference. The projectors, who made the contract with him, united with others, and then the united projectors adopted the original contract, and the Plaintiff thereupon abstained from opposition. I think this clearly entitled the Plaintiff to look to the Defendants as the parties liable to him; that is, as the parties on behalf of whom *Harper* and *Yates* made the contract" (a). Now, there are two circumstances there which do not occur in this case; there is here no evidence of the parties subsequently adopting the contract; and there is no allegation in the bill that the Plaintiff had any notice of the agreement or contract between the parties, or that they would adopt the contracts which existed between them; and it seems to me, looking at the real circumstances of the case, that the fact of the subsequent adoption can have little bearing in cases of this description. I agree with the projectors of company *A.*, that, in concurrence with them, I will oppose company *B.*; but then I add—it is possible that *A.* and *B.* may unite, which would be in effect a different operation altogether from what either of the bills contemplated—an Act to be carried into effect by *A.* and *B.* instead of *A.* alone: the projectors of *A.* may become co-projectors with the projectors of *B.*; and, if that be so, then I stipulate with the projectors of *A.* that the company which they shall so incorporate by their joint operations, shall give me such and such advantages. The parties then stand in this position: I have agreed with one set of persons, that, if they promote a certain line, it may be jointly

(a) 1 Sim. N. S. 598.

or not with others, the company, when incorporated, shall give me such and such advantages. If such an agreement exists, how can the persons who, as Lord *Cottenham* expresses it in *Edwards v. The Grand Junction Railway Company*, are brought into a corporate body with certain powers,—how can they exercise those powers in opposition to the contract of which they have obtained the benefit?

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Observe how this case stands: eleven gentlemen, who project a company, enter into this contract with the Plaintiff. He says, if you join with another company, and become co-projectors of another line, I bind you down to these stipulations. In effect they do unite with the other line, and there is a complete amalgamation of the two. Upon that point I expressed my opinion before the reply. There is a clause in the Act, which is found in all railway Acts, that enumerates the persons who may be termed promoters. The 4th clause enacts, that *William Astell* and a number of other gentlemen there named, who were the promoters of what I call company *B.*,—not the one that contracted with the Plaintiff,—that they “and all other persons and corporations who have already subscribed to the undertaking called *The London and York Railway*,” that is, “company *B.*,” and all persons and corporations who have already subscribed to the undertaking called “*The Direct Northern Railway*,” that is, company *A.*, which has contracted with the Plaintiff; “and all persons and corporations who shall hereafter subscribe to the undertaking hereby authorised,” which is the *tertium quid* that arises from the fusion; “and the executors, administrators, successors, and assigns of all such persons and corporations respectively, shall be united into a company, for the purposes of the undertaking hereby authorised according to the provisions of the said recited Acts and of this Act, and for other the purposes herein and in the said recited Acts

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contained; and for the purposes aforesaid such company shall be incorporated by the name of *The Great Northern Railway Company*, and by that name shall be a body corporate, with perpetual succession, and shall have power to purchase and hold land for the purposes of the undertaking." Then I go to the directors, and I find that nine out of the gentlemen who contracted with the Plaintiff are directors of this fused company. In truth, the whole company on behalf of whom they were originally projecting, became co-projectors of the new company; and the executive body, if I may so term it, to the extent of nine out of the eleven, also became the executive of the new undertaking. What you find, therefore, is this,—here, at least, these projectors are bound; they are called into existence by the contract that they have made with the Plaintiff, by means of which he does not oppose the bill of the amalgamated company:—I take that to be the effect of the agreement, although not expressly stipulated; and, having acquired those powers, can they, because they are associated with other parties who may, for aught I know, have had no notice of this contract—and it is said they had not,—because they united with other parties—can they exercise those powers contrary to the agreement, by means of which the Plaintiff is prevented from opposing the measure?

Mr. *Wigram*, in his argument for the company, put this case:—He said, even if you get rid of the difficulty as affecting a corporation, and of the technicalities of not binding a corporation, except under its common seal, in a private arrangement, this could not hold good:—That, if *A.* agrees he will supply such a quantity of wool or other goods to *B.*, and afterwards *A.* enters into partnership with *C.*, you cannot make *A.* and *C.* supply that wool. That very probably may be so; but I will put this case: Suppose *A.* and *B.* are parties as solicitors or medical men, or otherwise, and *B.* retires, and he contracts with *A.* that he will not

practise within twenty miles of London, either by himself or in partnership with any one else, and then *B.* enters into a partnership with *C.* *B.* and *C.*, however inconvenient it may be to *C.*, so long as *B.* is under that contract, cannot practise within the prescribed distance. It is a direct infringement of his covenant, and therefore, to all intents and purposes, the party who has allied himself with him has had the misfortune of allying himself with a person who is under this engagement, and who cannot carry into effect the business for which he may have associated with *C.*, and the only course would be to sever his connection with the person so situated. Unquestionably this Court would not permit *B.*, though associated with *C.*, to carry on that which he had stipulated he would not carry on. In the same way, here are projectors of a line of railway, who say, if we adopt a new line, the makers of that new line shall do so and so; and I apprehend, in that state of circumstances, they and the other parties who may have become associated with them in the undertaking, cannot complain if they find themselves restrained from carrying into effect those powers which are given by the Act, contrary to the agreement of that associated body with which they have joined themselves, and which they undertook through the medium of the original projectors to perform.

The case of *Edwards v. The Grand Junction Railway Company* is of importance on this point; for the very point was argued before Lord *Cottenham*,—of the great hardship on the number of shareholders, who, it was said, had no notice of this agreement. One feels some difficulty in understanding how an agreement of this kind should not have been known; nor is it, I think, distinctly sworn that it was not known. It is only sworn, I think, that the positive agreement was not known; it seems to be a little difficult to understand how all this should have passed and the *Great Northern Company* have been entirely

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ignorant as to what had been done with regard to Lord *Lindsey's* property. However, I assume, for the purpose of the argument, that they did not know anything about it; and I find this observation of Lord *Cottenham* in *Edwards v. The Grand Junction Railway Company*, which seems to me to be applicable. It was urged strongly by Mr. *Jacob*, that it would be the greatest possible hardship, for it was said they had subscribed, and obtained an Act of Parliament, which they supposed gave them large and ample powers; instead of which, they found, that, by a private agreement made by some one, of whom they knew nothing, they were restricted in those powers, and were made to subscribe to an object not so beneficial as that which they contemplated. Lord *Cottenham* says, "It was contended for the Railway Company, that to enforce this equity would be unjust towards the shareholders of the company who had no notice of the arrangement." To this, two answers may be made: first, that the Court cannot recognise any party interested in the corporation, but must look to the rights and liabilities of the corporation itself; and secondly, that there is nothing in the effect of the injunction inconsistent with the provisions of the Act. Now both those things concur here. Looking at the whole corporation, we find that the whole corporation is affected by having imported into it this large body of promoters who have entered into an agreement with the Plaintiff, and that this agreement is not in any way inconsistent with any provisions of the Act. This is the main and important point in the case. It is a point, in some degree, new in its arrangement and in the facts which have occurred, because no one before appears to have had the providence to stipulate for what should be done in every possible result of the proceedings before Parliament, for the success of one line, the success of another line, or the success of the amalgamated body, as the present Plaintiff has done; but I think the principles contained in the case of *Edwards v. The Grand*

*Junction Railway Company*, are by no means new. In Lord *Cottenham's* usual masterly way—he applied principles previously existing to the particular case he had before him, but there was nothing novel in those principles; and looking to what he says in *Greenhalgh v. The Manchester and Birmingham Railway Company* (although that was a much more difficult case to deal with, as there was no contract anticipating amalgamation), I feel very little doubt, that, if he had had a case of this kind before him, the result of the principles he would have applied to it would have been, that, in effect, the *Great Northern Company* had become bound by the contract entered into originally with the *Direct Northern Company*.

There is one satisfaction I have in arriving at this conclusion, namely, that it is no surprise on the *Great Northern Company*; for nobody can possibly see the subsequent proceedings in this case, without at once coming to the conclusion, that, until within two or three months of the filing of this bill, there was not the slightest doubt on the part of the *Great Northern Company* that they were bound by this agreement, and that they acted upon it in a variety of ways, to which I will presently refer. In truth, they have done more than act upon it, for they have actually claimed the benefit of it, in opposition to relief sought against them by the Plaintiff in another suit. Still, I should have been unwilling to rest my judgment upon the acts they have so done. I am not sure, with reference to the 6000*l.* and the possession of the land, that there might not have been sufficient to enable me to say, that the agreement had become binding on them, if it were not so originally; but I should not have been content to rest upon that view of the case.

With regard to minor points—minor in comparison with that which went to the root of the whole case, although they

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are in themselves questions of importance—many objections have been taken:—First, it was said that the agreement was illegal; and the *Solicitor-General* pointed out passages which, certainly, I am bound to say I should rather not see in agreements of this description entered into by a Peer of Parliament; but I think *Simpson v. Lord Howden* (a) and *Lord Petre's case* (b) have concluded the point. I allude to the passages in which the Plaintiff undertakes, by every means in his power (which no one would hold to include his vote) to oppose one line and promote the other. It was said, the terms of this agreement went extravagantly beyond those in the prior cases, and that this Court would refuse to give effect to an agreement of such a description. I confess that it seems to me to be impossible to draw any substantial line of difference between the cases to which I have referred and the present case; and further than that, in this case I cannot shut my eyes to the fact, that, although the point was not raised, this agreement has been matter of great contest; it has gone up to the House of Lords, and the validity of a portion of the agreement has been decided upon, and has actually been enforced by the decision of the House of Lords; and the construction of another portion of the agreement has been argued before the Court of Queen's Bench, in a case directed from the Rolls, and it never occurred to any one to argue, that it was illegal, on the ground of the Plaintiff being a Peer of Parliament. In *Lord Petre's case*—where, an injunction having been granted *ex parte* a year before by Lord *Cottenham*, they came a year afterwards, when they found the great inconvenience of the injunction, and could not avoid passing by the Plaintiff's land—to dissolve it, and then raised this question of illegality; and the Vice-Chancellor of *England* said, that, after all that had taken place,

(a) 1 Railw. Cas. 326, 347.

(b) *Lord Petre v. The Eastern Counties Railway Co.*, 1 Railw. Cas. 462.



he should conceive himself bound to hold, that that would not be an objection which would avail them with reference to the question before him. Here much more has taken place.

It was then said (and that no doubt is a matter of some importance), that, supposing the Company could be bound in one sense, and supposing it was a legal agreement, still looking to the existing state of things, the agreement was inapplicable to the case, because it was one thing to have an agreement respecting the station and park wall, and other things of that kind, with a railway to come within three hundred yards of a nobleman's house, and a totally different thing with a railway two miles from the same spot. To this the answer is, that it seems to be concluded by the express terms of the agreement. The parties intended to contract for what should be done in the altered state of things; and this last clause, which has been held by the House of Lords to be a valid and substantive clause wholly independent of the other clause, provides for the very case in question, of the railway passing along the line of the *Great Northern*, and not passing along the line of the *Direct Northern*; and then there is the clause that there shall be the same provision as to "the viaducts, bridges, and other works of convenience, security, and accommodation, and the making and maintaining of such station, and the maintaining of such sufficient police force as respectively aforesaid, and all other the covenants and agreements hereinbefore contained." It was said, that it was not reasonable that parties, with their eyes open, should enter into such an agreement; but I cannot say that it is unreasonable. I cannot say that a nobleman may not think it sufficient consideration for a railway passing through his estate, to have the convenience of a station within two miles of his residence instead of a station eight miles off. We know it is much more pleasant and agreeable to be deposited two

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miles from the place of destination than eight miles; and that may be a reasonable ground for his consenting to let them have his land at a lower price, or even at all.

It was then strenuously insisted on that the Company had done nothing under the Act; and that, therefore, according to the doctrine of *Edwards v. The Grand Junction Railway Company*, you could not put in force any of the provisions contained in the agreement, because the company was not availing itself of any power acquired by virtue of the agreement. If I am right in my construction of the original agreement, that is precluded, because they have taken the Plaintiff's lands under the powers of their Act.

Mr. Wigram.—We did not say that we had done nothing under the Act, but only that we had done nothing under the agreement.

VICE-CHANCELLOR.—Nothing, it was said, was done under the agreement; but if the company have done anything under the Act, and if I am right in construing the agreement in the manner I have, as one binding on the company in the event of their putting the powers of their Act into force, the whole question arises. If I am wrong, the whole would, on that ground, fail, as far as that part of the case is concerned.

Then it is further said, that no benefit was derived from the agreement. That turns on the same point. I consider the benefit to the company was the benefit they derived from the opposition being withdrawn, and the amalgamated company not being opposed.

It was further argued (and that is also a matter of some importance), that it was not a fit subject for an injunction. It was said, that there has been no case in which an injunc-

tion has been granted to enforce a provision of this description, and that, in truth, *Rigby v. The Great Western Railway Company* (a)—and I am not aware that that ever came to a final determination—was a precedent, if anything, against the Plaintiff, because, in effect, no relief was given; and it would only have been given upon the case at the hearing. But that is not quite so. *Rigby v. The Great Western Railway Company* was a stronger case than this, because there the question involved the whole essence of the agreement. The party literally got nothing. He lost everything, unless he secured that provision. He agreed to take at a high rental the *Swindon* station, as a place of refreshment; and although, no doubt, he would have the other trains, yet he relied on the express trains as trains which would contain quite as many refreshment passengers as any other, if not more; and he would lose the benefit of that portion of the agreement, if those express trains were allowed to pass by, instead of being compelled to stop ten minutes at the station. In that case, however, it cannot be said, that relief was refused by way of interlocutory application, for, if that were so, Lord *Cottenham*, on the appeal, would simply have refused the motion. He did not do that; he did not treat it as a motion that could not be granted upon an interlocutory application; but he said, “upon the balance of convenience and inconvenience of the case, and looking to there being a point still to be decided at law” (which there was), “I will not grant the interlocutory application until the question is determined at law.” He did not, therefore, refuse the motion, or leave the matter to the hearing; but he allowed the motion to stand over, upon a consideration of the different conveniences and inconveniences. It certainly was a case in which there was some degree of nicety in the balance, because both parties might be much aggrieved. It might be

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(a) 2 Ph. 44.

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thought that the party who stipulated for the profit from the refreshment of passengers would have more difficulty in getting his damages than the railway company. But that observation was met by Lord *Cottenham*, by observing on the peculiarity of that case. *Rigby* was liable to indemnify *Griffiths*, the man to whom he had let the rooms, against any loss; and, therefore, Lord *Cottenham* said, "All you, *Rigby*, can ever be called upon to do is this: you must pay *Griffiths's* loss; *Griffiths* must get at the amount of his loss as best he can; and what you will have to recover from the company will be measured by the damages, if any, which *Griffiths* may recover from you." The case was dealt with in that way. Still the motion was not refused; neither did Lord *Cottenham* treat it as a motion that could not be granted, but, looking at the circumstances of the case, he sent it to law before determining it.

The difference between the case of *Rigby v. The Great Western Railway Company* and this case is, that there is here clearly no point that can be sent to a Court of law. The matter rests wholly on the principles of this Court. It is not a question of fact: it is a question of construction upon the agreement. At the hearing there can be nothing more before the Court with reference to the point of construction than there is at present. But, further than that, there are proceedings and acts on the part of the company (which I will presently advert to) which I think fully justify the Court in saying, that whatever might have been their effect as giving validity to an agreement, that was not in itself a binding agreement, yet are such as do not entitle the company to say that there shall be any longer delay, or that relief by enforcing performance of their agreement shall be postponed until the hearing of the cause.

Before I come to the conduct of the company, I will observe, that the last ground of opposition to the motion was

the delay. Now, the delay is, in some degree, connected with all those proceedings which have taken place, and the contest and disputes that have arisen between the parties. It is true, that as long ago as July the trains began to run, and the agreement with regard to stopping was not performed. In October the Plaintiff was told that the company did not intend to abide by the agreement. There are then communications for the purpose of coming to an arrangement, and the Plaintiff is told, "If you insist upon the trains stopping at *Tallington*, there is an end of all negotiations, and we cannot come to terms upon it." That was in October; but the negotiation does not terminate there. The company said, they would not give up that point; but the negotiation on all the matters in dispute between the parties is going on up to the month of January in the present year. What the Plaintiff says is, I think, reasonable enough. He says, "True you told me that you would not give up this point; but I might reasonably suppose, having several matters of dispute with you, that if I could arrange others on terms of advantage, as this seems to be an objectionable part of the agreement, I will give up that portion of it if you make me an equivalent by giving up other points which are in dispute between us; and, as long as negotiation is practicable, I do not wish to be driven into the Courts to litigate my rights. I continued my negotiation and correspondence with you, until I had ascertained that negotiation was no longer practicable, which was not until the 5th or 6th of January." In that state of things the bill was filed in February. The delay was not such, I think, under the circumstances of the case, and especially such as I am about to advert to, as should disentitle the Plaintiff to his remedy by means of an injunction.

The other circumstances of the case are somewhat peculiar: First, there is a litigation with Mr. *Capper*. The

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*Great Northern Railway Company*, in one sense, are no parties to that litigation. An action is brought against Mr. *Capper* for 6000*l.* *Capper* pleads the notice which he had given to determine the agreement in consequence of the bill not having passed in nine months. That is carried up to the House of Lords, and is not finally disposed of until June, 1851; and then it is finally determined that the agreement is binding on *Capper* with reference to the new state of things arising from the amalgamation, and accordingly that the 6000*l.* is payable under it. In the meantime, the *Great Northern Railway Company*—the amalgamated company—had served a notice to take the Plaintiff's land, that is to say, the nine acres and odd, and some other acres, in one notice. They gave a notice to take twelve acres of the Plaintiff's land; they also gave a notice to take another portion of his land for temporary purposes. The Plaintiff always relying, as it appears to me, upon the agreement, takes no steps to have the value of his land ascertained. The company no doubt distinctly assert the powers of their Act—giving the notice, having the valuation made by surveyors, and the money deposited in the Bank. It is true, as they say, that they do not act under the agreement; but it must be observed, that their conduct is quite consistent with their admitting that the agreement was binding upon them. I do not say they in any way admitted it, but it is quite consistent with an admission that the agreement was binding upon them; because, at that time, Mr. *Capper* was disputing his liability to the agreement, not on the ground of its not being originally binding, but because he said it was determined. If it was not determined they might be bound. The litigation was going on and both parties, with good sense, enter into the agreement in May, 1851, by which, after reciting what has been done, it is arranged, "that the said company shall be at liberty forthwith to enter into possession of the said 2*a.* 0*r.* 6*p.* and 0*a.* 2*r.* 18*p.* respectively of land, subject and

without prejudice to the payment of the purchase money to be payable in respect thereof; and notwithstanding the expiration of the time limited for the compulsory purchase or taking of lands in the month of June next, it shall be lawful for the said Earl and the said company respectively to exercise such powers with respect to the aforesaid three several notices and as to any other lands of his lordship, for the period of three calendar months after the final decision of the said case in error, as the said parties respectively might now exercise under the powers of the said Acts, and without prejudice to any agreement entered into between the said Earl and *S. J. Capper* and others, which may affect the company." That left everything, as it seems to me, exactly as it stood, subject to the determination of the House of Lords.

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The subsequent events are different. As soon as the case is decided against *Capper* in the House of Lords, the company, and not *Capper*, pay the 6000*l.* and interest and costs. The company say, they were in honour bound to indemnify *Capper*; all I can say is, that if they are not bound by the agreement, I cannot understand by what right they can have applied the funds of the company in such a payment; for unquestionably it is a misapplication of the funds of the company, if they were not bound by *Capper's* agreement. They were not entitled to pay the 6000*l.* for these nine acres of land. There was no agreement made to that effect, except the original agreement. They had no power or authority to pay the 6000*l.* except by virtue of that original agreement; and if they say it is an excessive price, they were bound to go to a jury, and enter into a new agreement for the land which they required. However, the company pay it; and they hold the land to this day: they have the Plaintiff's land, and they have paid for it the very price stipulated by the agreement. I do not feel, that, after that, it is so clear that they have done no act under the agreement. It is true, they took the

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land under their powers, but that was pending the discussion whether the agreement had or had not been determined; and when that question is settled, they pay the money and keep the land, without attempting to ascertain its value in any other way.

There is then the point which the *Solicitor-General* raised, and which, I think, he put too high with regard to these preliminary agreements; whether a corporation is bound by a contract not under seal, he said rightly, depended upon the principle of part performance. I should be sorry to rest the case upon this point; but it is at least doubtful whether, having taken this land, and having paid the 6000*l.*, the price contemplated by the agreement, without any other assignment of value, and having no power to pay the 6000*l.* except by virtue of the agreement, but treating this as a purchase of the land, the case of *The London and Birmingham Railway Company v. Winter (a)*, does not apply. The objection there raised was want of mutuality in the agreement, it being argued that the *London and Birmingham* Railway Company were not bound, the agreement not being under seal; but Lord *Cottenham* held, that, as they had taken possession of the land and made a railway over it, they were bound. I confess it appears to me to approach very nearly, if not quite, to a purchase of Lord *Lindsey's* land at the price stipulated, and to amount to a part performance of the agreement. However, as I have said, I do not rest the case upon that; it is one of the acts of the company which I am going through, to shew the right that the Plaintiff has to call for interference by injunction.

What is the next act? These parties, who say they were not bound by this agreement, gave notice to take land for temporary purposes, wanting it for permanent purposes, to

(a) Cr. & Ph. 57.



make a communication with the *Welland* Canal, and they proceeded so to use it. The Plaintiff then filed his bill for an injunction, in which he stated the agreement of the 4th of March, 1846, and contended, that, having given him notice that they would take the land for temporary purposes, they were not entitled to take it for permanent purposes. The company not only did not in their defence to this application repudiate the agreement, but they said: 'True it is, there was an agreement of March, 1846; and in that agreement will be found a clause by which you stipulate that any additional land wanted shall be sold by you for 300*l.* an acre.' There happened, unfortunately for the company, it appears in the result, to be also a clause, that, although he was to let them have it for 300*l.* an acre, yet it was not to be taken without his consent. That is the view the Court of law ultimately took of it. But the company relied on this very agreement, and said, 'You are bound to furnish us with land at 300*l.* an acre, and we are willing to give you that for it; and therefore, because you have entered into the agreement with us, the injunction cannot be sustained;' treating the agreement as one entered into for their benefit. The Master of the Rolls acceded to that view, and the injunction was, in consequence, withheld, and a case directed to a Court of law, to determine whether that was the result of the agreement—and not to decide whether there was an agreement between the parties, for that was affirmed by the Defendants. If the decision of the Court of Queen's Bench had been in their favour, there was no doubt they would have dismissed the bill and would have got rid of the injunction. It turned out to be against them, and therefore the injunction was granted; but the injunction had been postponed, and would have been refused entirely if the result had been different; and then they would have had the benefit of the very contract which they are now rejecting. It seems to me, after that, to be an extremely strong thing to say, that I am injuring these

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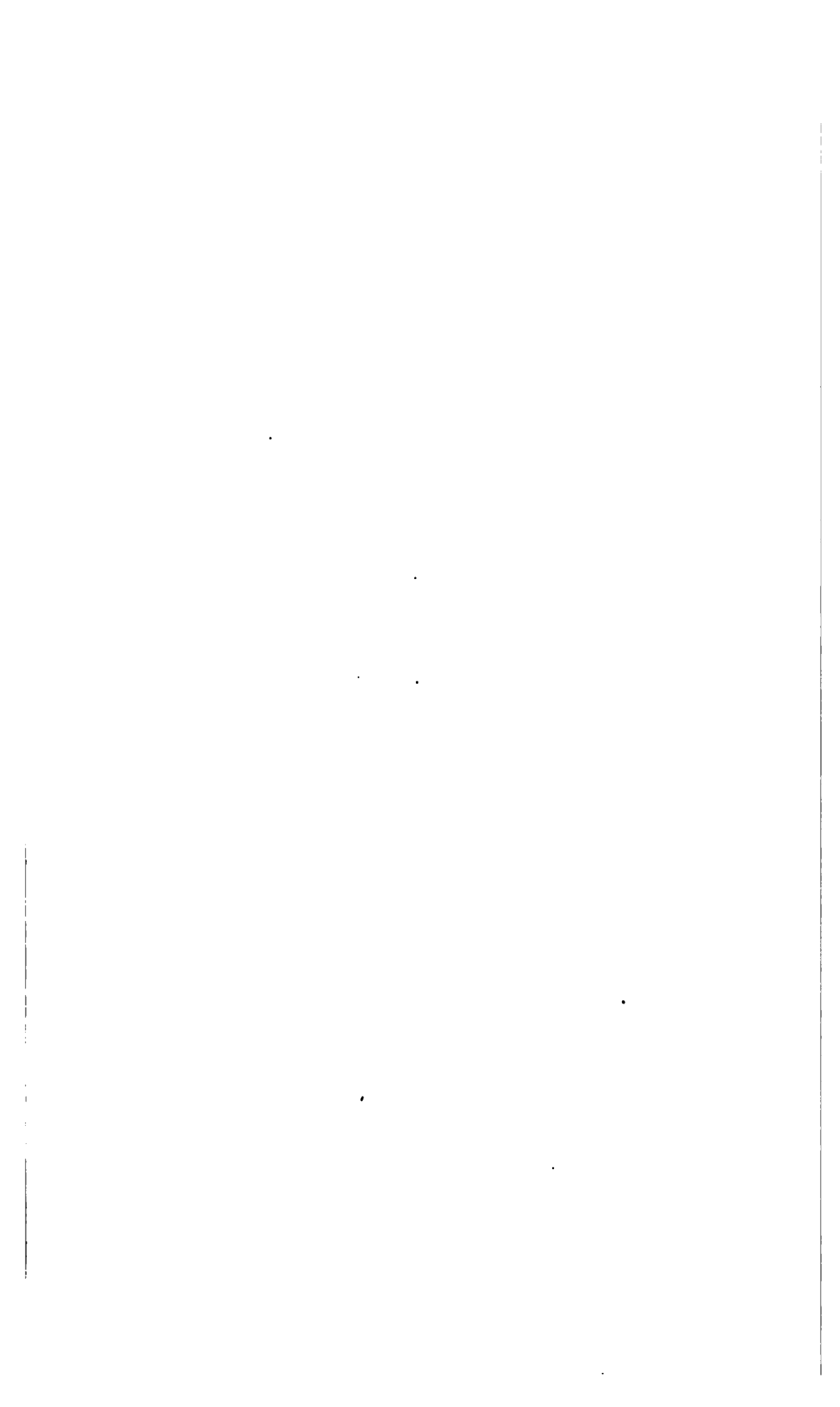
parties by giving effect to the contract on an interlocutory application by injunction, when it was not only a contract by which they conceived themselves bound, but one which they asserted and sought to make available.

There is a correspondence which I do not think it necessary to go through, but in which there is a letter from the solicitor of the company, saying distinctly to the solicitor of the Plaintiff, "ever since the decision of the House of Lords, there has been no contest between us, except the construction of the agreement." That is the result of the letter; but they now contend that the whole contest has been, whether they are bound by it. It would, as I have said, be difficult to rely on these facts of themselves as establishing an agreement. I feel the force of that argument, looking at the difficulty of binding a company by any act not under its corporate seal; but if I have come to a correct conclusion, (and of course all must depend on that), that the original agreement did in effect bind them, I say that this long continued concurrence of all parties in the agreement is at least a reason why the remedy which is now sought may be granted on interlocutory application, where the sole point remaining between the parties is the construction of the agreement in a Court of Equity, without having assistance from additional facts, or the opinion of a Court of law.

There is a point that I have not referred to, and which has reference to the form of the injunction. Mr. Wigram suggested, that in truth the Plaintiff has here got substantially almost all he asks for; he does not get the express trains to stop, but he gets the express trains to *Peterborough*, which stop there for a quarter of an hour; so that if he were coming on by the express train, he could stop there and come on by another train which starts five minutes afterwards for *Tallington*; and therefore, the

Plaintiff, in effect, has all the benefit he could require, minus five minutes and the inconvenience of shifting his carriage. That observation, however, does not apply to all the trains, and the contract is that all the trains should stop. At the same time, I feel that in this case it is not a contract which should be enforced by this Court in an unreasonable manner; I feel that very strongly; and therefore, I should propose to give the company time to make their arrangements. I think, if they had until the 1st of April for that purpose, it would be sufficient; and the injunction may follow the words of the agreement, and restrain the company from permitting any trains for the accommodation of passengers, and for the conveyance of goods, luggage, carriages, and horses respectively to pass along the railway, without stopping at the *Tallington* station. It would, of course, be useless to the Plaintiff to require that all these trains should stop. It will be only necessary that they should stop for the Plaintiff and his tenants, when they are travelling. There should be some understanding with regard to signals, but this must be a matter for private arrangement. The injunction is not to operate before the 1st of April, and there will be liberty to apply.

1853.  
 THE EARL OF  
 LINDSEY  
 v.  
 THE GREAT  
 NORTHERN  
 RAILWAY CO.  
*Judgment.*



# APPENDIX.

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No. 1.

## Cases on Chancery Procedure

DECIDED BY

SIR WILLIAM PAGE WOOD, KNT.,  
VICE-CHANCELLOR,

IN

HILARY AND EASTER TERMS, 16 VICT., AND THE SITTINGS  
FOLLOWING.

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### Accounts.

PRACTICE in Chambers and in the Master's Offices with regard to requiring  
copies of verified accounts: *Cannon v. Evans*, (App. p. ix)

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### Affidavit.

MEEK v. WARD—*April 12th*, 1853.

AN affidavit was taken before a Notary, who was certified by the Governor of the State of *New York* to be a Notary Public of the county *Niagara*. The Notary certified that the affidavit was sworn before him on a certain date, but did not express the place at which it was sworn.

Affidavit sworn abroad ordered to be filed, although the place at which it was sworn was omitted in the jurat.

Mr. *Prior* applied for an order that the affidavit should be filed, notwithstanding the omission on the face of the jurat of the place at which it was sworn.

The VICE-CHANCELLOR said, he thought the Court must assume that the Notary was acting in pursuance of his duty, and that he would not perform a notarial act out of the jurisdiction in which alone he had authority to do so.

## HOPKIN v. HOPKIN—April 12th, 1853.

A writ of ne exeat, and the proceedings taken under it, discharged, with costs, on the ground that the affidavits had been taken before the solicitor of the Plaintiff in the cause. And the Court refused to impose upon the Defendant, as part of the terms of such dismissal, that an action should not be brought against the Plaintiff in respect of the arrest.

MR. *ELMSLEY* moved to discharge a writ of ne exeat regno, and the proceedings taken under it. The Defendant had been arrested under the writ, and had given bail. The present motion was founded on several grounds: first, that the affidavits filed in support of the application for the writ, did not state that the debt was in danger: *Tomlinson v. Harrison* (8 Ves. 32), *Boehm v. Wood* (T. & R. 344); secondly, that there had been on the application a suppression of material facts; and thirdly, that the affidavits were sworn before the Plaintiff's solicitor, and were not, therefore, admissible: *In re Hogan* (3 Atk. 813), *Wood v. Harpur* (3 Beav. 290).

The VICE-CHANCELLOR inquired whether, upon the latter fact alone, the order must not be discharged?

Mr. *Amphlett*, admitting that there had been an irregularity, submitted, that, although the Court might deal with the costs so as to protect the Defendant, yet the Court would not discharge the order, when it appeared upon the affidavits that the Plaintiff would be immediately entitled to make a new application for the same order.

The VICE-CHANCELLOR discharged the order, with costs; but gave the Plaintiff leave to make another application for a renewed writ.

Mr. *Amphlett* asked, that the Defendant might be put upon the terms of not bringing any action founded on the arrest.

The VICE CHANCELLOR said, that he had not the power of giving the Defendant any remedy she might be entitled to in respect of the arrest. The damages, if any, would be more properly tried in an action than by any other mode. He ought not, therefore, to prevent the Defendant from pursuing her remedy, if she had any, by an action.

April 13th.

Mr. *Amphlett* moved for a writ of ne exeat.

Mr. *Elmsley* objected that a second writ would not be granted where the Defendant had been arrested under the former writ.

Nemo debet bis vexari pro eâdem causâ: *Raynes v. Wyse* (2 Mer. 472).

Mr. *Amphlett* contended that this did not apply to cases where the writ was discharged for mere irregularity, and not on the merits; and cited *Tidd's Pract.*, Vol. 1, pp. 174 et seq., 9th edit.

The question of the right to a second writ was not decided, an order having been made, by consent, for the deposit and security of the property.

### Answer.

RABBETH v. SQUIRE—*April 30th, 1853.*

MR. *SIMPSON* moved that the Record and Writ Clerk might be ordered to file an answer of some of the Defendants in this suit, in which, by an error, the words "to the bill of complaint of the above-named Plaintiffs" had been omitted. The answer was intituled in the cause, in the form specified by the Orders, (see Schedule D., General Orders, 7th August, 1852), in which the Plaintiffs and Defendants were all named; but the subsequent title was "The answer of &c., Defendants," omitting the words "to the bill of complaint of the above-named Plaintiffs."

An answer properly intituled ordered to be filed where there had been an omission of the words "to the bill of complaint of the above-named Plaintiffs."

The VICE-CHANCELLOR ordered the answer to be filed, observing, that the cause was sufficiently identified. The answer, being fully and accurately intituled in the cause, must be an answer to the Plaintiffs' bill in that cause, and could be an answer to nothing else.

### Charity.

In the Matter of THE GLOUCESTER CHARITIES—*March 4th & 11th, 1853.*

A PETITION of three of the burgesses of the city of *Gloucester*, intituled "In the Matter of the several Charities,—of Sir *Samuel Romilly's Act* (52 Geo. 3, c. 101),—of the Municipal Corporation

Appointment of new trustees under the provisions of the Municipal Corporation Act, may be made by the Vice-Chancellors.

As to the number of vacancies in a charity trust which will justify an application to the Court.

Costs of parties appearing on such applications for the purpose of aiding the Attorney-General, in pursuance of public notice, in securing fit appointments, not allowed out of the charity estate.

Act (5 & 6 Will. 4, c. 76),—and of the Trustee Act, 1850.” The petition prayed for the appointment of six new trustees of the several charities. There were fifteen surviving trustees, and the six vacancies had occurred since the last appointment.

Mr. *Rogers*, for the petition, mentioned a recent case (a), in which it had been determined by the Lord Chancellor, that orders under the Municipal Corporation Act for the appointment of new trustees may be made by the Vice-Chancellors.

Mr. *Rolt*, for the surviving trustees.

Mr. *Wickens*, for the Attorney-General, submitted that it would be very desirable that some rule should be laid down by the Court with regard to the number to which the trustees of such charities ought to be reduced, to render an application for a new appointment of trustees justifiable. Petitions for this purpose were not unfrequently presented without any necessity, and were in such cases a source of great expense to the charity estates. On one occasion a petition had been refused by Lord *Lyndhurst* on this ground.

The VICE-CHANCELLOR said, that any rule on the subject referred to, would be rather a matter for the consideration of all the Judges of the Court, than for a decision by one branch of the Court only (b).

Mr. *Levin* appeared for twenty-seven members of the corporation, who had, in conformity with the terms of the public notice of the application, which invited parties to lay before the Attorney-General any objections or suggestions with reference to the proposed appointments, communicated with the Attorney-General on the subject, and upon whose suggestion some alterations in the proposed appointments had been made by the At-

(a) *In Re Northampton Charities*, cor. Lord Chancellor, 12th January, 1853. (See Trustee Act, 1850, 13 & 14 Vict. c. 60, s. 32; 5 & 6 Will. 4, c. 76, s. 71).

(b) In the case of the *Bedford Charity*, a part of the scheme approved by the Court, and for the establishment of which application was directed to be made to Parliament, was, that the

number of trustees should be twenty-four, and that application should be made to supply the vacancies when that number should be reduced to eighteen. It would seem, therefore, that the Court would not disapprove of a petition for the appointment of new trustees, where the number is reduced by one fourth.



torney-General. Under such circumstances he asked for their costs.

The VICE-CHANCELLOR said, that, formerly, applications were made for the appointment of new trustees, and the order for the appointment was made, without any communication with the persons locally interested in the charities. This often occasioned great dissatisfaction, and sometimes led to litigation in this Court, for the purpose of removing persons who were objected to, and had been so appointed. The Attorney-General, to obviate this inconvenience, had adopted the rule of requiring notices of application for the appointment of new trustees of municipal charities to be published and made known in the town, in order that other persons might have the opportunity of giving any information or suggestion with regard to the propriety of the proposed appointments. It was not, however, contemplated, that persons who might on public grounds be induced to give their advice to the Attorney-General, to secure the appointment of fit persons, should receive costs out of the charity funds. In such cases they must be content to render their aid gratuitously, for the benefit of the charities.

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In the Matter of THE FREE GRAMMAR SCHOOL OF THOMAS CONYERS AT YARM—23rd April, 1853.

THE Governors of the school were incorporated by a charter of Queen Elizabeth, in 1596; but, new members of the corporation not having been appointed to supply the vacancies, the body had for many years ceased to exist. Some recent benefactions having been made for the re-establishment of the school, a petition was now presented for the settlement of a scheme, the appointment of certain gentlemen to be trustees, and an order to transfer the recently accrued funds, and vest the property of the charity in the new trustees.

Mr. Brodrick, for the petition.—One of the proposed provisions of the scheme was, that the number of trustees should be twelve; and that, when they should be reduced to five, application should be made to the Court to fill up the number.

Schemes providing for the future appointment of new trustees of charity estates, and for obtaining the directions of the Court on other specified contingencies, may contain directions that the application shall be made before the Judge at Chambers, the Attorney-General having notice.

Appointment of new trustees

of a charity estate in the place of an extinct corporation, with the assent of the Crown.

Form of order approving a scheme, obviating the necessity of setting out the scheme in the order.

Mr. *Wickens*, for the Attorney-General, said, that the Master of the Rolls had adopted a useful rule on this point, which was likely to be very convenient and beneficial to charities, in avoiding the expense of petitions. His Honour had directed that application should be made for the appointment of new trustees, by summons, before the Judge at Chambers, notice of the application being given to the Attorney-General.

The VICE-CHANCELLOR thought the application might be properly and beneficially made in the manner which the Master of the Rolls had adopted; and in settling the scheme, as well with regard to the appointment of new trustees, as on some other occasions in which it was contemplated by the scheme that circumstances in the government of the charity might call for the direction of the Court, his Honour ordered that the trustees should apply to the Court, and that such application should be made before the Judge at Chambers, of which application the Attorney-General should have notice.

It was then suggested, whether the case of an extinct corporation was one which could be treated as the case of a trustee who could not be found, within the Trustee Act, 1850; or whether, if not, the order could not be made under Sir *Samuel Romilly's* Act. It was ultimately arranged, that the order to vest the charity estate in the trustees should be taken with the assent of the Crown.

To avoid the necessity and expense of setting out the scheme in the order of the Court, it was suggested, that the settled copy of the scheme should be prepared and signed by the Judge, and filed in the Court; and that the order should refer to the copy so filed. It was stated that this course had been approved of by the Master of the Rolls; and it was accordingly adopted in this case.

### Clerical Error.

AFFIDAVIT sworn abroad ordered to be filed, although the place at which it was sworn was omitted in the jurat: *Meek v. Ward*, (App. p. i).

An answer, properly intituled, ordered to be filed where there had been an omission of the words "to the bill of complaint of the above-named Plaintiffs:" *Rabbeth v. Squire*, (App. p. iii).

## Conduct of Sale.

DALE v. HAMILTON—Feb. 26th, 1853.

THE circumstances of this case are reported 5 Hare 369, and 2 Phillips, 266. The Master had made his report under the decree.

Mr. Bacon and Mr. Renshaw, for the Plaintiff, asked for a direction to the Master to proceed with the sale.

Mr. Roll and Mr. Shebbeare, for the Defendant, contended, that the whole of the agreement ought to be specifically performed, and not a part only; and therefore, that there should be a specific performance of that portion which provided that the Plaintiff should have no power or authority over the land.

The Plaintiff in a cause held entitled to the conduct of the sale of partnership property, although, according to the contract, if performed without suit, he might not have been entitled to interfere in the sale.

The VICE-CHANCELLOR.—It is admitted, that the ordinary rule is, that, where the Plaintiff obtains a decree for sale, he is entitled to the conduct of the sale. It is true, that the Court has a discretion as to whom it will commit the conduct of the sale. This is shewn by the case of *Dixon v. Pyner* (7 Hare, 331), which was cited. It was insisted, on the part of the Defendants, that, having regard to the agreement, which provided "that the Plaintiff should have no power or authority whatsoever over the said land, and that he should not be entitled to receive any compensation whatsoever therefrom until the whole is sold and paid for, and all outlay and expenses incurred thereon are deducted therefrom," (see 5 Hare, 372; 2 Phil. 267), the conduct of the sale ought not to be given to the Plaintiff. The stipulation in the contract, that the Plaintiff should have nothing to do with the sale, would have been no doubt important if the contract had been performed, according to the view which the Court has taken of the duties of the parties, without the necessity of any suit to enforce it; but this was not the case. The suit having been rendered necessary, and the decree for sale having been made by the Court, the case comes within the ordinary class in which the conduct of the sale is given to the Plaintiff. It is then said, that the greater interest of the Defendants in the property is a reason for giving to them the direction of the sale; but this circumstance does not, I think, deprive the Plaintiff of the ordinary

right which the rule of the Court gives him to conduct the proceedings in the suit, including the sale of the property. It is not therefore necessary to give any special directions on the subject.

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*Order.*  
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This Court doth order, that so much of the property conveyed to *Robert M'Adam*, deceased, in the pleadings named, and the Defendant *Robert Hamilton*, under and by virtue of the indenture of the 16th day of October, 1843, as remains unsold, be sold by public auction in *Liverpool*, in lots, with the approbation of the Judge to whose Court these causes are attached, to the best purchaser or purchasers that can be got for the same, to be allowed of by the said Judge; wherein all proper parties are to join, as the said Judge shall direct; and in order to such sale the parties are to produce before the said Judge, &c.: And it is ordered, that the monies arising by the sale be paid into the Bank, with the privity of the Accountant-General of this Court, to be there placed to the credit of the first-mentioned cause; And it is ordered, that it be referred to the said Judge to ascertain and state what sums or sum of money have or has been advanced or paid by the said Defendant *Robert Hamilton* and the said *Robert M'Adam* respectively on account of the purchase of the said property, and at what times or time such sums were respectively advanced or paid: And it is ordered, that the said Judge do also ascertain and state how much, having regard to the division and distribution which has been had of the sum of 7334*l.* 15*s.* 10*d.* in the Master's report of the 2nd day of July, 1852, mentioned, is due to the said *Robert Hamilton* and the estate of the said *Robert M'Adam*, deceased, respectively, for principal and interest, according to the declaration of trust of the 27th of October, 1843, on the sums advanced or paid by them respectively as aforesaid: And it is ordered, that the further consideration of this cause be adjourned. Liberty to apply.

## Copies of Accounts.

CANNAN v. EVANS—*April 28th, 1853.*

MR. BEVIR, for the Defendant, the executor, moved that the Master, to whom the cause was referred, might be ordered to proceed on the account of the Defendant, made out by him and verified by affidavit, in pursuance of the order in the cause, dated the 6th of August, 1852, without the Defendant being required to make any copy, abstract, or extract thereof or therefrom, for the use of the Master or his Chief Clerk.

Practice in Chambers, and in the Masters' offices, with regard to requiring copies of verified accounts.

The grounds stated in support of the application were these: By the 39th section of the Masters Abolition Act, 15 & 16 Vict. c. 80, it was enacted, that, after the first day of Michaelmas Term, 1852, the Masters should, with reference to the proceedings before them, adopt all the rules and regulations, and conduct the business of their respective offices, as nearly as might be, in the manner in which similar business is conducted by the Master of the Rolls and Vice-Chancellors, respectively. By the 23rd Order of the 16th of October, 1852, it is directed that no copies are to be made of deeds or original documents, where the originals can be brought in without special direction; and that, only when directed, copies of accounts, &c. are to be supplied for the use of the Judge and his Chief Clerk, the course of proceeding in Chambers being ordinarily the same as in Court upon motions. This evidently applied to cases in which the proceedings were oral. The 29th Order of the same date provides, that, where any account is directed to be taken, the accounting party is, unless the Judge shall otherwise direct, to make out his account and verify the same by affidavit; and the account is to be referred to by the affidavit as an exhibit, and left in the Judge's Chambers; and, by the 44th Order, it is directed that the certificate or report is to state the result of such account, and not to set the same out by way of schedule, but is to refer to the account verified by the affidavit filed. By the form of the certificate given, in the schedule to the same Orders, a provision is made for cases in which the account brought in and verified has been subsequently altered, and in which a transcript of the altered account has been passed. A different practice had been adopted in the offices of the Masters, some requiring a copy of the verified account to work on, as in the present case, which would occasion a considerable increase of expense to

the parties in the case of a voluminous account,—others being satisfied with the original account, without a copy,—and others adopting a middle course, and requiring a partial copy. The Chief Clerk in the Judge's Chambers did not require a copy. In the present case the Master had refused to proceed with the account, unless a copy of the verified document was furnished in the first instance.

The VICE-CHANCELLOR expressed a doubt whether he had power to interfere with the discretion of the Master on this point. If the case had been before him in Chambers, he probably should not have required the copy. It was not the practice in his Chambers to require it. He should not, however, think it right to make any order in such a case. The parties might state what was the practice in his Chambers, and that he did not think it necessary, as a matter of course, to require such a copy of the verified account; and, if it were considered useful, he should be happy to communicate with the Master on the subject.

### Copies of Records.

COPIES of bills, answers, and depositions in this Court, ordered to be certified by the Clerk of Records and Writs, under the 14 & 15 Vict. c. 99, s. 14: *Reese v. Hodson*, (App. p. xix).

### Costs.

COSTS of parties appearing on applications for the appointment of new trustees of charities, for the purpose of aiding the Attorney-General, in pursuance of public notice, in securing fit appointments, not allowed out of the charity estate: *In the Matter of the Gloucester Charities*, (App. p. iii).

#### WALDRON v. FRANCES—April 29th & 30th, 1853.

Costs given to the Plaintiff in a legatees' suit, as between solicitor and client, where the fund is insufficient to pay the legacies in full.

A SUIT by the Plaintiff, a legatee, on behalf of himself and all other legatees of the testator. The certificate of the Chief Clerk found the amount of the estate, and the amount of the legacies; and it appeared, that, after payment of the costs, the estate would be insufficient to pay the legacies in full.

Mr. *Hare*, for the Plaintiff, asked for his costs as between solicitor and client.

Mr. *Chandless* and Mr. *Eddis*, for the executors, contended.

that the costs of the Plaintiff in a legatees' suit were only given as between party and party. The rule in creditors' suits, where there was an insolvent estate, had never been applied to legatees' suits; and there were several cases in which it had been in fact refused to residuary legatees and next of kin.

Mr. *James Russell*, amicus curiæ, said, that in his experience the Court had always refused to legatees the costs as between solicitor and client, and mentioned one case to that effect.

The VICE-CHANCELLOR required some authority to be produced, before giving the costs otherwise than as between party and party.

The case of *Cross v. Kennington* (11 Beav. 89), was subsequently mentioned.

Mr. *Chandler* denied that the case referred to was an authority for the simple principle, that, in all legatees' suits, where the legacies must abate from the insufficiency of the fund, the Plaintiff was entitled to costs as between solicitor and client: first, because, in *Cross v. Kennington*, it appeared that the legacies had been by that suit recovered out of the real estate; and, secondly, because the decision was founded on *Stanton v. Hatfield* (1 Keen, 358), in which the costs were given under very special circumstances.

The VICE-CHANCELLOR said, the Master of the Rolls appeared to have decided *Cross v. Kennington* upon the general principle, that, if the assets were deficient, the costs ought to be paid as between solicitor and client; and he should follow that authority.

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JONES v. BATTEN—April 14th, 1853.

ON a motion for an injunction to restrain the sale of certain mines, the Plaintiff offering to pay off what was due to the Defendants, the mortgagees, the Court having refused the application—

Mr. *Rolt* and Mr. *Burdon*, for some of the Defendants, and Mr. *Wigram* and Mr. *Cotton*, for others of them, asked for the costs of the motion.

Reservation of the costs of a motion, but providing for the event of the bill being dismissed before the hearing.

The VICE-CHANCELLOR was of opinion that the costs could not be disposed of, without hearing from the Defendants the explanation

of circumstances in the case which might affect that question; and as those circumstances must be gone into at the hearing of the cause, it would be more convenient to reserve the question of costs until that time.

Mr. *Wigram* and Mr. *Roll* then suggested, that, if the suit should not be prosecuted against all or any of the Defendants, or they should be obliged to apply to the Court to dismiss it for want of prosecution, the Defendants would be in a difficulty as to their costs of this application, which they alleged was unnecessary, and not justified by the circumstances.

The VICE-CHANCELLOR said, that the costs of the Defendants of the motion, in the event referred to, ought to be provided for; and he made the following order:—

Refuse the motion, and reserve the costs until the hearing; but, if the bill should be dismissed before the hearing against all or any of the Defendants, the costs of such Defendants of such motion to be costs in the cause.

### Declaratory Decree.

GREENWOOD v. SUTHERLAND—April 22nd, 1853.

Case in which the Court refused to make a declaration as to the interests of parties who might be entitled in reversion.

A SPECIAL case.—Many questions arose under the will in this case. Several legacies were given to the sons and daughters of the testator, with a provision, that, if any of them should die without leaving issue surviving, the same should fall into the residue. The gift of the residue was as follows:—"When and as each child dies, I give and bequeath the said principal and residuary monies unto and equally amongst the lawful issue of my said sons and daughters, their respective executors, administrators, and assigns, payable as the youngest issue of each child attains the age of twenty-one, with benefit of survivorship amongst them in case of any of their deaths during minority." The sons and daughters were living, and one of the questions in the special case was, "What children, grandchildren, or other more remote issue of the sons and daughters of *Mary Greenwood* respectively, for whose benefit the specific legacies or sums are given by her said will, are comprehended in the word issue in the bequests of such specific legacies or sums; and what interests



do such issue respectively take therein; and at what ages or times are such interests vested and payable respectively?"

Mr. *Rolt*, Mr. *Teed*, Mr. *Lee*, Mr. *Elmsley*, Mr. *Humphrey*, Mr. *Hardy*, Mr. *Forster*, Mr. *Woodhouse*, Mr. *Rastrich*, appeared for the different parties.

The VICE-CHANCELLOR made declarations with regard to the interests of the legatees before the Court, but refused to make any declaration on the question with regard to the bequest to the issue of the sons and daughters.

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FLETCHER v. ROGERS—*Jan. 18th, 1853.*

AN administration suit, prosecuted by bill.

*W. Rogers* by his will, dated in 1847, after directing his debts and funeral and testamentary expenses to be paid, and bequeathing pecuniary legacies, gave the whole of his property as follows:—"To be sold, as soon as conveniently after my decease, the remainder of my property. I bequeath to my brother *Thomas Rogers*, my sisters *Mary* and *Amelia*, the remainder of my property, to be equally divided amongst all and each of them, if living at the time of my decease, then amongst their surviving children; and I give, devise, and bequeath all and every my household furniture, linen, and wearing apparel, books, plate, pictures, china, and also all and every sum and sums of money, which may be in my house, or be about my person, or due to me, at the time of my decease; and also all other stocks, funds, and securities for my money, book debts, money, or bonds, bills, notes, or other securities, and all and every other my estate and effects, whatsoever and wheresoever, both real and personal, whether in possession or not; and I nominate, constitute, and appoint my sister *Elizabeth Fletcher* to be executrix of this my will."

Case in which the Court made a declaratory decree, under section 50 of stat. 15 & 16 Vict. c. 86.

Mr. *Jessell*, for the Plaintiff, stated the question to be, whether the estate of the testator was bequeathed to his brother and sisters absolutely, or for their lives only.

Mr. *Shadwell*, for the Defendants, *Thomas Rogers* the brother, and the testator's sisters *Mary* and *Amelia*, and the husband of the latter.

Mr. *Bovill*, for the children of the testator's brother and sisters, cited *Billing v. Billing* (5 Sim. 232).

The VICE-CHANCELLOR held, that the word "then" was to be construed as an adverb of time; and that the brother and sisters took each one-third of the residuary estate of the testator, for their respective lives.

The counsel for the several parties then submitted, that, the property being small, and all the parties (namely, the brother and sisters of the testator, and their children now living) being parties to the suit, the Court would make a declaration with respect to the interests of the children. They referred to sect. 50 of the stat. 15 & 16 Vict. c. 86.

The VICE-CHANCELLOR said, that he thought the statute left it to the discretion of the Court, in what cases a merely declaratory decree ought to be made; and that this was a case in which the Court might, with propriety and convenience, make such a decree; and he held, that, after the death of each of the Defendants, the brother and sisters of the testator, the one-third share of him or her so dying would be divisible between and among his or her children living at the time of such death.

GARLICK v. LAWSON—*April 27th, 1853.*

The Court refused to make a declaratory decree on a special case, during the lifetime of the tenant for life, with regard to the interests of parties entitled in reversion.

A SPECIAL case, on the will of *W. Lawson*, who bequeathed the interest and dividends of one moiety of his residuary estate to his daughter *Ann Lawson*, for her life, "and the said moiety or principal, at her death, to her lawful issue;" and in default of such issue, then he bequeathed such moiety or principal to the children of his daughter *Jane Garlick*; and the testator gave the remaining moiety of his estate unto his daughter *Jane Garlick*, for her life; and the said moiety or principal, at her death, to her lawful issue; with powers to the executors to pay any fit and proper sums for the maintenance and advancement of the children of the two daughters. The widow and daughter and *Ann Lawson* were executrices of the will. *Ann Lawson* was unmarried. *Jane Garlick* had ten children, seven of whom survived the testator. The questions were, first, whether the words lawful issue (regard being had to the maintenance clauses and the general terms of the testator's will) were not to be considered as synonymous with children; and, secondly, whether, as regarded the moiety of the testator's residuary estate, bequeathed to *Ann Lawson* for life, the words "lawful issue" (even if not

considered synonymous with children), did not mean issue of the said *Ann Lawson* living at her death.

Mr. *Wigram* for the Plaintiff, the adult children of the said *Jane Garlick*;—Mr. *A. J. Lewis* for the Defendants, the infant children of *Jane Garlick*, and the representatives of those who had died;—and Mr. *Osborne* for *Ann Lawson*.

The VICE-CHANCELLOR held, that the words “lawful issue” were synonymous with children; but said that the time would not arrive for determining the second question until after the death of *Jane Garlick*.

Mr. *A. J. Lewis* submitted, that, under the 50th section of the stat. 15 & 16 Vict. c. 86, a declaratory decree might be made. All the children of Mrs. *Garlick*, who was a lady far advanced in life, were parties; and the whole question on the will was before the Court.

The VICE-CHANCELLOR said, the provision in Sir *George Turner's* Act, 13 & 14 Vict. c. 35, was, that it should be lawful for the Court, upon the hearing of a special case, to determine the questions raised therein, and to declare its opinion thereon, and, so far as the case should admit of the same, upon the right involved therein, without proceeding to administer any relief consequent upon such declaration; and that every such declaration of the Court, contained in any such decree, should have the same force and effect as such declaration would have had, and should be binding to the same extent as such declaration would have been, if contained in a decree made in a suit between the same parties instituted by bill<sup>(a)</sup>. Now, a declaration in the lifetime of the tenant for life, with regard to the interests of the parties entitled in reversion, could not have been made in a cause at the time that statute passed, and, therefore, could not have been made on a special case. Then came the late Act, which merely said, that a suit should not be open to objection, on the ground that a merely declaratory decree or order was sought. It enabled the Court in its discretion, where it should appear to be necessary for the administration of an estate, or to the relief to which a plaintiff might be entitled, to make a decree, notwithstanding it should be merely declaratory. But this was not a case in which it was necessary to do so.

(a) Sect. 14.

## Decree.

A MEMORANDUM of service of notice of the decree upon infants and out of the jurisdiction, ordered to be entered: *Chalmers v. Laurie*, (App. p. xxvii).

Order to enrol decree: *Webb v. The Direct London and Portsmouth Railway Company*, (App. p. xvi).

Cases in which the Court made a declaratory decree under sect. 50 of stat. 15 & 16 Vict. c. 86: *Fletcher v. Rogers*, (App. p. xiii).

Case in which the Court refused to make a declaration as to the interests of parties who might be entitled in reversion: *Greenwood v. Sutherland*, (App. p. xii).

The Court refused to make a declaratory decree in a special case, during the lifetime of the tenant for life, with regard to the interests of parties entitled in reversion: *Garlick v. Lawson*, (App. p. xiv).

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## Dismissal of Bill.

RESERVATION of the costs of a motion, but providing for the event of the bill being dismissed before the hearing: *Jones v. Batten*, (App. p. xi).

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## Enrolling Decree.

WEBB v. THE DIRECT LONDON AND PORTSMOUTH RAILWAY COMPANY—*March 18th, 1853.*

Order to enrol  
decree.

MR. MOXON applied under the 2nd and 3rd General Orders of the 7th of August, 1852, for leave to enrol the decree, more than six months having elapsed since the same was pronounced. The decree was made by Sir George James Turner, V. C., (9 Hare, 129) and reversed by the Lords Justices, (1 De Gex, Mac. & G. 521). The Defendants consented to the order being made; and the only point suggested was, whether the order to enrol the decree should be made by the Lord Chancellor.

The VICE-CHANCELLOR said, that, as the cause was attached to this branch of the Court, unless there was any settled practice to the contrary, the motion would, he should think, be properly made here; and he made the order accordingly.

## Evidence.

TERMS imposed on the Plaintiff in an issue, with regard to the examination *de bene esse* of an aged witness, where the Plaintiff had failed in trying the issue at the time directed by the Court: *Reeve v. Hodson*, (App. p. xxiv).

BRENNAN v. PRESTON—April 28th, 1853.

MR. ROLT and Mr. Prior moved, on behalf of the Defendants, that Mr. *William Hislop Clarke*, Barrister-at-law, of &c., and Mr. *Frederick Thomas White*, Barrister-at-law, of &c., might be appointed Examiners, or an Examiner, to take the examination of witnesses in these causes; or that the Defendants might be at liberty to use, on the hearing of these causes, affidavits as to the course of dealing and the amount receivable according to the usage and custom of brokers in effecting charterparties of ships,—such affidavits to be made by ship-owners and ship-brokers residing in *London* or the neighbourhood thereof, instead of having the evidence of such witnesses produced orally.—The 31st section of the statute 15 & 16 Vict. c. 86, was referred to in support of the application.

Examiner specially appointed for the examination of witnesses in *London*, on the application of the Defendants, who were restrained by an interlocutory injunction, in a case in which the Plaintiff had undertaken to submit to any order which the Court might make for the early hearing of the cause, and no appointment could be obtained for examination before the Examiner for upwards of a month from the time of making the application.

The circumstances, as they appeared on the affidavit in support of the motion, were these:—The replication had been filed on the 5th of March, 1853; and the day fixed for closing the evidence was the 7th of May. By an order of the 23rd of March, liberty was given to the parties to use affidavits, to be made by witnesses residing elsewhere than in *London* or *Liverpool*; and the Plaintiffs undertook to abide any order which the Court might make for the early hearing of the cause. The Defendants were unable to obtain an appointment with the Examiner, for the examination of their witnesses, until the 31st of May and the 1st of June; and they were under an injunction restraining them from proceeding at law on the subject in question in the cause.

Mr. *Follett* opposed the motion.—The Court would not appoint Examiners specially to act in *London*, where there were Examiners of the Court. There was no precedent of such an application; and the Court would not adopt a practice which would enable any party in a cause to apply at any time for the appointment of his own Examiner.

The VICE-CHANCELLOR said—Such applications, if made, would in most cases, no doubt, be refused. In the present case, he was told that the Court had expressed an opinion that the cause ought to be expedited, and had, in fact, placed the Plaintiffs under an undertaking for the purpose of bringing the cause to an early hearing. It appeared that the Defendants could not obtain an appointment for the examination of witnesses before the Examiner earlier than the 31st of May or the 1st of June. Under these circumstances, he thought that the application ought to be granted.

Mr. *Follett*, on the part of the Plaintiffs, then asked that they might be at liberty to read, at the hearing, the affidavits which had been filed by them on the motion, without requiring the witnesses to repeat their statements in new affidavits.

It was finally agreed that those affidavits should be used; the Plaintiffs undertaking, if required by the Defendants, to produce the witnesses before the Examiner for cross-examination. And the Court appointed one of the gentlemen named in the notice of motion as Examiner.

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WIGAN v. ROWLAND—April 23rd, 1853.

Production of an original bill on a motion for a decree.

The Court has jurisdiction under the 15 & 16 Vict. c. 86, to issue a subpoena ad testificandum or a subpoena duces tecum, requiring the attendance of witnesses on a motion for a decree—*See* *ibid.*

MR. *FREELING* applied for leave to serve a subpoena duces tecum on the Registrar of the Consistory Court of the diocese of *St. Asaph*, in order that a will might be produced as evidence in the cause. The cause was brought forward by motion for a decree, in which the evidence was necessarily taken by affidavit (see 15 & 16 Vict. c. 86, s. 15; Gen. Order, 23 et seq., August, 1852); and the Clerk of Records and Writs declined to issue the subpoena without the order of the Court.

The VICE-CHANCELLOR said, that the power of compelling the attendance of witnesses was not implied, but was usually given in special words, as it was a right which exposed persons to great inconvenience. The 39th section of the statute 15 & 16 Vict. c. 86, applied to cases where the Court might think proper to bring up, for examination again, any witness who had been previously examined. Upon referring to the 40th section of the statute 15 & 16 Vict. c. 86, which provides, that any party may,

by a writ of subpoena duces tecum, require the attendance of any witness before an Examiner, and examine such witness orally, for the purpose of using his evidence upon any claim, motion, &c., in like manner as such witness would be bound to attend to be examined with a view to the hearing of the cause: the question was, whether it was necessary to appoint an Examiner, in order to procure the issuing of the subpoena. He thought that was not necessary, and that the subpoena ought to be issued.

[The *Vice-Chancellor* added, that, in this case, the Registrar (Mr. *Leach*) had referred to the old practice of the Court, by which a will was ordered to be delivered out by the Registrar of the Ecclesiastical Court upon security (a).]

(a) Will ordered to be delivered out by the Registrar of the Consistory Court, in order to its being produced at the hearing, to save the expense of the Registrar's own attendance, on the Plaintiff giving security to return it within a fixed time, without being erased or defaced: *Wakeland v. Thompson*, 31st January, 1838. Under the old prac-

tice, the Registrar of the Consistory Court was to settle the security. In *Whaley v. Whaley*, August, 1829, the Vice-Chancellor said, that the security should, for the future, be settled by the Master, in case the parties differed. *Frederick v. Aynscombe*, 1 Atk. 627; *Pearce v. Pearce*, 30th September, 1836.

#### REEVE v. HODSON—*March 5th*, 1853.

MR. CHARLES HALL moved, that the Clerk of Records and Writs might be ordered to certify copies of the bill, answers, and depositions in his custody in this suit, to be used at law upon the trial of an issue directed from this Court. The application was made under section 14 of the statute 14 & 15 Vict. c. 99, which provides that "whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having, by law or by consent of parties, authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted; and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding four-pence for every folio of ninety words."

Copies of bills, answers, and depositions in this Court, ordered to be certified by the Clerk of Records and Writs, under the stat. 14 & 15 Vict. c. 99, s. 14.

The VICE-CHANCELLOR said, it appeared to him the Act was imperative; and he ordered the copies to be certified accordingly.

NORMANVILLE v. STANNING—*April 28th, 1853.*

On a motion to dissolve an injunction to stay proceedings at law, the Plaintiff in equity has no right, under the 40th section of the stat. 15 & 16 Vict. c. 86, to require that the motion shall stand over in order that he might examine orally witnesses who have made affidavits for the Defendant.

MR. BACON and Mr. Karslake, for the Defendant, moved to dissolve an injunction to restrain proceedings in an action at law on a bill of exchange.

Mr. Roxburgh, for the Plaintiff, said, that an affidavit on behalf of the Defendant, of 100 folios in length, had been filed on the 25th of April; and he submitted that the Plaintiff wished to examine the deponent orally, and that the present motion should stand over until that could be done: Stat. 15 & 16 Vict. c. 86, s. 40.

The VICE-CHANCELLOR said, that the affidavit appeared to have been filed sufficiently long before the motion was made, to enable the Plaintiff to meet it; but, even if the affidavit had been filed only the evening before, the Plaintiff, having obtained an injunction to stay proceedings at law, must be prepared to meet the application to dissolve it. With regard to the application to examine the deponent *vivâ voce*, it had been contemplated that the order enabling parties to examine witnesses on a motion might be used or attempted to be used in injunction and other cases, for the purpose of creating delay; and it was to guard against this result, that the last clause of the order had been introduced, which provided, that the Court should always have a discretionary power of acting upon such evidence as may be before it at the time, and of making such interim orders or otherwise, as might appear necessary to meet the justice of the case.

## Exceptions.

LAW v. THE LONDON INDISPUTABLE LIFE POLICY COMPANY and A. ROBERTSON—*April 20th, 1853.*

Exceptions for insufficiency of answers to interrogatories as to books and papers under the new practice, generally discouraged.

EXCEPTIONS were taken in this case to the answer, and, among others, for not sufficiently answering the interrogatory as to books and papers.

Whether a Company or corporation answering under their common seal, is a Defendant against whom an order may be made under the 18th section of the 15 & 16 Vict. c. 86—*Quære.*



The Defendants were a registered body, and *A. Robertson*, their secretary, was made a Defendant, for the purpose of discovery. (See *Mitford*, Pl. 188, 4th edit.; *Hare*, Tr. on Discovery, p. 83). It was admitted, and decided by the Court, that the interrogatory was not answered in the strict manner required by the old form of pleading. The exceptions had been taken both to the answer of the Company and to that of the secretary; but, by arrangement, it was agreed that the argument on one set of exceptions should decide both.

*Mr. Bacon* and *Mr. Rogers* for the exceptions.

*Mr. Rolt* and *Mr. Torriano*, for the Defendants, submitted that the trial of the question of the sufficiency of the answer as to books and papers, in this elaborate and expensive way, was now wholly unnecessary; and if the practice were not tacitly abolished, it would be at least discouraged by the Court. The 18th section of the New Procedure Act enabled the Court, without any interrogatories, to make an order for the production of documents relating to the matters in question in the suit; and in order to facilitate the proceeding under this section and the 20th section of the same statute, which gave a corresponding right to Defendants against Plaintiffs, the Court had actually settled a form of affidavit, on the model of a carefully-prepared answer, to be made by the party from whom the discovery was sought. (See 9 *Hare*, App. xlix.; *Rochdale Canal Company v. King*, cited *Id.*; *S. C.*, 15 *Beav.* 11). The Court would, therefore, require parties to adopt the simple and summary course they provided.

*Mr. Bacon* said, that the present case had this specialty,—that the Plaintiff could not have the answer of the Defendants, the Company, upon oath, and could have no relief against the secretary; and the case, therefore, was not within the 18th section of the New Procedure Act.

The VICE-CHANCELLOR, adverting to the course of proceeding which may now be taken in Chambers with regard to the production of documents, said, he should hope that exceptions to answers, on the ground of the interrogatory as to books and papers not having been sufficiently answered, would not hereafter be generally taken in such cases. In the present case there was, perhaps, some ground for the exception. He was not certain, that, under the 18th section of the New Procedure Act, he could

have ordered the Company to produce the documents which the secretary might admit; or whether the present case was, in fact, within the provisions of the Act.

The Company undertaking to produce the documents which might be admitted by the affidavit of *Robertson*, the secretary, the Court made no order on this exception.

## Execution of a Portion of a Trust.

PRENTICE v. PRENTICE—April 22nd, 1853.

Case of a decree for the purpose of carrying into effect an arrangement as to a part of the estate of a testator, without administering the estate or executing the trusts of the will generally.

THE testator, *Thomas Prentice*, was a partner in the firm of *Thomas Prentice & Co.*, corn, coal, salt, and manure merchants, at *Ipswich*, *Maldon*, and *Stowmarket*, the testator being entitled to two-thirds, and *Manning Prentice* to one-third, in the partnership. The articles of partnership contained a provision, that, in the event of *Thomas Prentice's* decease, *Manning Prentice* should carry on the business as before; and that one-half share, from the 1st of May following *Thomas Prentice's* decease, should be for the benefit of his family. *Thomas Prentice* died in July, 1852, seised in fee of premises at *Stowmarket* and *Ipswich*, as a trustee for the partnership; he had also entered into a contract for the purchase for the partnership of some malting premises at *Stowupland*, and the deed had been executed, but was in the hands of the vendors, the purchase-money not having been paid. The testator, *Thomas Prentice*, by his will, appointed his widow and *Manning Prentice* his executrix and executor; and, after bequeathing annuities and legacies to his widow and family, and disposing of the residue among them, desired that two of his sons, whom he named, should each have one-fourth share of his business, as they attained twenty-four, adding: "*Manning Prentice*, my son, is hereby empowered to purchase any part of the estates he may desire. Should it be desired, I hereby empower my executrix and my executor to appoint some person or persons to act with them in the discharge of this trust, and to invest them with the same powers as they are invested with by me." *Mary Prentice* the widow, and *Manning Prentice*, proved the will, and were Plaintiffs in the suit; the children and residuary legatees, adults and infants, being Defendants. The bill stated, that,

in order to facilitate the winding-up of the testator's affairs, an arrangement had been come to between the parties interested therein who were competent to contract, and the Plaintiffs, that the messuages and premises belonging to the partnership should be conveyed to the Plaintiff *Manning Prentice*, as the surviving partner of the firm, upon his paying or accounting for the value thereof (found by surveyors as therein stated) to the partnership. The bill prayed, that the heir-at-law of the testator, on whom the legal estate had descended, might be declared to be a trustee of the premises for the partnership; and that the Plaintiffs might be at liberty to carry into effect the said arrangement; and that the heir-at-law might be ordered to join and concur in conveying the premises to the Plaintiff *Manning Prentice*, upon the said Plaintiff paying or accounting to the Plaintiffs, for the purposes of the testator's estate, for two third parts or shares of the valuation of such premises.

Mr. *Rolt* and Mr. *Hislop Clarke*, for the Plaintiffs, and Mr. *Bevir*, for the Defendants, referred to the 51st section of the stat. 15 & 16 Vict. c. 86, as enabling the Court to exercise its jurisdiction over the portion of the trust which was the subject of the suit, without requiring the whole trusts of the will to be executed, or the accounts taken, under the direction of the Court.

The VICE-CHANCELLOR considered the case to be one in which a decree might under the statute be made on the subject of the suit, without further executing the trust; and he made an order accordingly—

Declare the Defendant (the heir-at-law) a trustee of the estate &c., for the partnership of *Thomas Prentice & Co.*; And it appearing to the Court, that the proposal of the Plaintiff *Manning Prentice* to become the purchaser of the estate, &c., for the sum of £            is a fit and proper proposal, and for the benefit of the parties interested in the testator's estate, the Court doth allow of such proposal; And let the Plaintiffs, *Mary Prentice* and *Manning Prentice*, be at liberty to carry the same into effect. Tax the costs of all parties, and direct the executrix and executor to pay the same out of the testator's estate.

## Guardian ad Litem.

FOSTER v. CAUTLEY—April 12th, 1853.

Relationship of  
a guardian ad  
litem to the  
infant.

MR. *DRUCE* moved to appoint a guardian ad litem, mentioning *Egremont v. Egremont*, L. J., Dec. 9th, 1852.

The VICE-CHANCELLOR said, that in such applications he wished to be satisfied by the affidavit, that the proposed guardian was a relation, connection, or friend of the family, and therefore a proper person to be entrusted with the defence of the suit on behalf of the infants, and not a mere volunteer. He wished at least that it should be shewn how the proposed guardian was introduced to the family. This precaution seemed to him to be necessary in cases where the Court dispensed with the rule under which the infants were produced in Court, and which afforded some security that the guardian was connected with or known to the family.



## Infant.

RELATIONSHIP of a guardian ad litem to the infant: *Foster v. Cautley*, (Supra).

A memorandum of service of notice of the decree upon infants ordered to be entered: *Chalmers v. Laurie*, (App. p. xxvii).



## Issue.

REEVE v. HODSON—Feb. 21st, 1853.

Terms imposed on the Plaintiff in an issue, both with regard to the costs and to the examination de bene esse of an aged witness, where the Plaintiff had failed in trying the issue at the time directed by the Court.

MR. *WIGRAM* and Mr. *Charles Hall* moved, that the issue directed in this cause to be tried at the last *Yorkshire Spring Assizes*, might be taken pro confesso against the Plaintiff. The ground of the application was, that the Plaintiff had not proceeded with diligence to try the cause, in pursuance of the order of the Court. It appeared that the Plaintiff had, on the 9th of March, served a witness, whose testimony, it was admitted, would be of importance, with a subpoena ad testificandum for the 12th of March; and that, from the arrangement of the special jury business, the cause would have been probably tried on the 14th of

March; that the witness, who was the judge of a county court, stated, that he was unable, from the business of his court, to attend on the 14th or 15th of March; that the Plaintiff applied to the Judge at Nisi Prius for a postponement of the cause, until the 17th of March, which was refused; and that after this the Plaintiff withdrew the record. *Casborne v. Barsham* (5 Myl. & Cr. 113), *Hargrave v. Hargrave* (8 Beav. 289).

It was proved that the Plaintiff had proceeded bonâ fide, and (except that he had served the absent witness with the subpoena too short a time before the cause was to be tried) had made every endeavour to procure the attendance of the witness; and the case was therefore reduced to the question, on what terms the Plaintiff should be placed as to the trial of the issue at the next Assizes. The counsel for the Defendants insisted, that, besides paying the costs at law and in this Court, liberty should be given to the Plaintiff to cross-examine a witness above seventy years of age, whose depositions taken in the cause contained an error, and which error would have been corrected if the witness had been examined at the Spring Assizes, whilst his death before the next Assizes might possibly prevent the correction from being made. There was an affidavit of the existence of the error referred to.

Mr. *Roll* and Mr. *Shapter*, for the Plaintiff, submitted, that he should be allowed to try the cause at the next Assizes; and that there was no reason for making the Plaintiff pay the costs of the application, or of the former trial, in which he had not been in any default, and had only failed to proceed from the unavoidable absence of a necessary witness.

The VICE-CHANCELLOR.—Suppose the case to be, that you did your best to procure the attendance of the witness, are the Defendants to be subjected to the costs occasioned by the preparation for the trial, when the trial is postponed because you cannot bring your witness?

Mr. *Roll*.—If the Defendants refused to consent to a reasonable application to postpone the trial until the 17th, as in this case they did, the Court would not give them the costs.

The VICE-CHANCELLOR said, he had no doubt that the Plaintiff must pay the costs incurred at the Spring Assizes, which he would have paid if the case had been wholly at law, and the

record had been withdrawn; and that the Plaintiff must also pay the costs of this application. With regard to imposing as a term the cross-examination of the witness, he had some difficulty; but he thought the Defendants were entitled to that protection within the rule expressed by Lord *Langdale* in *Hargrave v. Hargrave* (8 Beav. 289) of imposing such terms "as might tend to relieve the Defendants from any injury which they might be subject to by the delay:" (Id. 292). The death of the witness before the trial might prevent any explanation of the former depositions.

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Order that the Plaintiff proceed to the trial of the issue at the ensuing Summer Assizes for the county of *York*; and, in default thereof, that the issue be taken against him pro confesso; to pay such costs of the parties at the last Spring Assizes as he would have been ordered to pay at law, on withdrawing the record in an action, and the costs of all parties of this motion. Liberty to the Defendants to cross-examine a witness for the Plaintiff before the Examiner de bene esse, giving notice to the Plaintiff of such cross-examination; and the Plaintiff thereupon to be at liberty to examine the same witness. Usual directions as to reading such depositions at the trial.

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### Legatees' Suit.

COSTS given to the Plaintiff in a legatees' suit as between solicitor and client, where the fund is insufficient to pay the legacies in full: *Waldron v. Frances*, (App. p. x).

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### Motion.

ON a motion to dissolve an injunction to stay proceedings at law, the Plaintiff in equity has no right, under the 40th section of the stat. 15 & 16 Vict. c. 86, to require that the motion shall stand over, in order that he might examine, orally, witnesses who had made an affidavit for the Defendant: *Normanville v. Stanning*, (App. p. xx).

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### Motion for Decree.

THE Court has jurisdiction under the 15 & 16 Vict. c. 86, to issue a subpoena ad testificandum, or a subpoena duces tecum, requiring the attendance of witnesses on a motion for a decree—*See*: *Wigan v. Rowland*, (App. p. xviii).

## Re Great Regno.

A WRIT of ne exeat and the proceedings taken under it discharged with costs, on the ground that the affidavit had been taken before the solicitor of the Plaintiff in the cause; and the Court refused to impose upon the Defendant as part of the terms of such dismissal, that an action should not be brought against the Plaintiff in respect of the arrest: *Hopkin v. Hopkin*, (App. p. ii).

## Notice.

LEAVE given to serve notice of motion before appearance does not also include leave to serve short notice; and if that be required, it must be expressly given: but where short notice has been given without the leave of the Court to that effect, it is not of course to order the party moving to pay the costs, unless any costs have been specially occasioned to the other parties by the irregularity: *Newton v. Chorlton*, (App. p. xxxi).

## Notice of Decree.

CHALMERS v. LAURIE—*March 18th, 1853.*

MR. W. R. ELLIS moved that the Clerk of Records and Writs might be ordered to enter a memorandum of service of notice of the decree, under Rule 8th of the 42nd section of the statute 15 & 16 Vict. c. 86, and the General Order 41 of the 7th of August, 1852. The affidavit shewed personal service of notice of the decree on an adult, and also on infants, in *Ireland*. The Record and Writ Clerk did not consider that this was due proof of service under the Act and the General Orders, where it appeared to have been made out of the jurisdiction, and made on infants.

A memorandum of service of notice of the decree upon infants, and out of the jurisdiction, ordered to be entered.

In support of the application it was observed, that, under the old practice, process might have been prayed by the bill against parties out of the jurisdiction, when they should come within the jurisdiction; and the suit would have proceeded in their absence. (See *Browne v. Blount* (2 Russ. & My. 83), *Kirwan v. Daniel* (7 Hare, 347).) Provision was afterwards made by the statutes 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82, and by the 33rd General Order of May, 1845, (see *Whitmore v. Ryan*, 4

Hare, 612), for service of the subpoena on parties out of the jurisdiction, upon leave being antecedently obtained. The former practice, and the practice under the Statutes and the Orders of 1845, established, that the Court would either proceed without the absent parties, or serve them out of the jurisdiction. Then came the New Procedure Act, and the Rule as to the service of the decree or order and the entry of a memorandum of such service (41 of August, 1852), and the 18th General Order of the 16th of October, 1852, which provided, that, upon the return of the summons, the Judge was to be satisfied by proper evidence, that all necessary parties had been served with notice of the order. It only required such service as, freed from any technicalities of form, would satisfy the Judge.

The VICE-CHANCELLOR.—The Judge must in that case be satisfied by having before him the memorandum of service, according to the 41st General Order.

Mr. *W. R. Ellis*.—The Plaintiff now asks, that the memorandum of service may be entered, upon proof of such service as (excepting the previous leave of the Court) would have been sufficient to enable the Court to assume jurisdiction over the rights of the absent parties under the former practice, at least since 1845.

The VICE-CHANCELLOR said, that a question had been suggested on this Rule, whether the Act referred to service out of the jurisdiction of the Court. He had conferred with some of the other Judges on this question; and those with whom he had so conferred were of opinion that the words of the Act were so general, that the service might be effected as well out as within the jurisdiction.

With regard to service on infants, the point had been considered. There was at present no rule which prevented service upon an infant of notice of the decree.

The memorandum was therefore entered.



## Parties.

WHITTINGTON *v.* GOODING—*July 16th, 1852.*

A CLAIM by a creditor against the surviving executor and devisee in trust of the real estate of a testator and the parties beneficially interested in the real estate, for the administration of the personal and real estate, and payment of the debts. There was no power of sale of the real estate in the will. The affidavit stated, that the will was proved by the Defendant *Gooding*, and by three other persons, named *Sumison*, *Robinson*, and *Lamborn*, who had since died. On the part of the Defendants, some of whom were married women, no objection was taken that the representatives of the deceased executors and devisees ought to be parties, all parties being desirous of saving expense.

Form of order for administration, dispensation with the representatives of deceased executors and trustees as parties to the suit, when incapacitated persons are interested in the estate.

Mr. *Fredling* for the Plaintiff, and Mr. *Karslake* for the Defendant.

The VICE-CHANCELLOR(a) made an order in the following form : —“ Take the usual accounts of the personal estate of the testator come to the hands of the Defendant *Gooding*, either alone or jointly with his co-executors or any of them. Inquire whether any and what part of the personal estate is outstanding, and whether any and what part of the testator's personal estate was in the hands of the deceased executors, *Sumison*, *Robinson*, and *Lamborn*, or any or either of them, at the times of their respective deaths, and whether the same (if any) can be recovered. And if the Master shall find that the personal estate received by *Gooding* and the personal estate outstanding is insufficient for payment of debts, and that no part of the personal estate was in the hands of the deceased executors at the time of their respective deaths, or that no part of the personal estate (if any) which was in their respective hands at the time of their respective deaths can be recovered, then let him take accounts of rents and profits of the real estate. Direct the sale of real estate, &c.”

(a) Sir G. J. Turner.

## Payment into Court.

ISAACS v. WEATHERSTONE—*March 10th, 1853.*

Order to pay money into Court at the hearing, without a notice of motion for that purpose.

AT the hearing of this cause, it appeared, by the answers of the Defendants, who were trustees, that a sum of money belonging to the trusts was in their hands.

Mr. *Jervis*, for the Plaintiffs, asked that it might be brought into Court.

Mr. *Hardy*, for the Defendants, submitted to bring in the fund, on condition that certain costs which they had incurred were paid to them. If this should not be assented to, the Defendants objected to pay the fund into Court, which the Plaintiffs were not entitled to require at the hearing without a motion for that purpose.

The VICE-CHANCELLOR said, that, under the old practice, a motion was required to be made, founded on an admission in the answer for the payment into Court at the hearing of the cause, on the ground that circumstances might have taken place after the answer was put in, affecting the fund, which might render it improper for the Court to make the order, and which circumstances the Defendants had no opportunity of bringing before the Court, as no affidavits could have been used at the hearing of the cause; but now it was open to the parties to bring before the Court any material circumstance not in issue in the cause, by affidavit; and the Court might, therefore, without any danger of injustice, make the order at the hearing, without the form of a previous motion.

## Payment out of Court.

In the Matter of THE TRUSTS OF THE WILL OF W. FLACK—  
*March 4th, 1853.*

Petitions for the payment out of Court of money which has been paid in under the Trustee Relief Act, must state the affidavit upon which the payment into Court was made.

A PETITION for the payment out of Court of money which had been paid in under the Trustee Relief Act (10 & 11 Vict. c. 96).

Mr. *Forster* for the petition.

The VICE-CHANCELLOR said, that the petition should set out the affidavit upon which the money was paid into Court by the trustee.

## Production of Documents.

WHETHER a Company or Corporation, answering under their common seal, is a Defendant against whom an order may be made under the 18th section of the 15 & 16 Vict. c. 86—*Quare: Law v. The London Indisputable Life Policy Company and A. Robertson*, (App. p. xx).

A motion for production of documents, at or before the hearing, must be founded on the answer [or affidavit, see 9 Hare, App. p. xlix] of the Defendant [or party against whom the application is made]; and the 18th section of the stat. 15 & 16 Vict. c. 86, does not enable the Court to make an order for such production, founded upon the affidavit of any other person, and not upon the admission of the party against whom the order is sought: *Lamb v. Orton*, (1 Drew. 414).

An order for the production of documents will not be made against parties who have ceased to be in a position in which they have control over the documents and power to obey the order: *Penny v. Goode*, (1 Drew. 474).

## Revivor and Supplement.

THE Judges of the Court have decided that, where an abatement in a suit takes place before any decree has been made in the cause, the suit cannot be revived by order under sect. 52 of the stat. 15 & 16 Vict. c. 86; but a bill of revivor is necessary.

Revivor of a suit before decree to be by bill and not by order, under the 52nd section of the stat. 15 & 16 Vict. c. 86.

## Scheme.

SCHEMES providing for the future appointment of new trustees of charity estates, and for obtaining the directions of the Court on other specified contingencies, may contain directions that the application shall be made before the Judge at Chambers, the Attorney-General having notice; and form of an order approving a scheme obviating the necessity of setting out the scheme in the order: *In the Matter of the Free Grammar School of Thomas Conyers at Yarm*, (App. p. v).

## Service.

NEWTON v. CHORLTON—*March 11th, 1853.*

MR. ROLT and Mr. Smythe moved for an injunction to restrain proceedings at law.

Mr. Bacon and Mr. Osborne objected that the notice of motion, which was given for this day by the leave of the Court, had been served less than two clear days before the motion was to be made, (i.e., it had been served on the 9th of March); that the leave to serve notice of the motion before appearance did not include also leave to give short notice of motion; and the fact, that the

Leave given to serve notice of motion before appearance, does not also include leave to serve short notice, and, if that be required, it must be expressly given; but where short notice has been

given without the leave of the Court to that effect, it is not of course to order the party moving to pay costs, unless any costs have been specially occasioned to the other parties by the irregularity.

service was to be made on a Defendant in a distant county (*Lancashire*), was not a ground for dispensing with the usual notice: *Hart v. Tulk* (6 Hare, 611); and the motion having been irregularly made, the Defendant was entitled to have it refused, with costs: (*Douthwaite v. Douthwaite*, M. R., 25th November, 1851, not reported, where a motion was made to restore a claim to the paper, upon notice given on the Saturday before, and which was on that ground refused with costs.—Mr. *Bates* for the motion; Mr. *Roundell Palmer* contra.)

Mr. *Smythe* mentioned a case of *Blakeney v. Dufour*, before the Master of the Rolls, in the present month, where his Honour, on refusing a motion, of which short notice had been given without leave, refused also to give costs.

THE VICE-CHANCELLOR allowed the objection to the motion. But, as to costs, said, that in the reported case referred to, (*Hart v. Tulk*), the Court had directed the motion to stand over; and against the unreported case of *Douthwaite v. Douthwaite*, there was the unreported case of *Blakeney v. Dufour*. If the Defendant had to be served in *London*, or within a short distance, and there appeared to have been improper delay or negligence in using the order of the Court which gave the Plaintiff leave to effect the service, there might be reason for ordering him to pay the costs. Where, however, there was no ground for imputing such negligence, the reasonable course would be not to give costs, unless it appeared that any additional costs were occasioned to the Defendant owing to the irregularity. If, when the motion came on to be heard, it should appear that the inaccuracy had occasioned any expense to the Defendant, it was right that the Plaintiff should pay it.

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### Will.

PRODUCTION of an original will, upon security being given, without requiring the attendance of the officer of the Registrar: *Wigan v. Rowland*, (App. p. xviii).

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### Witness.

EXAMINER specially appointed for the examination of witnesses in London, on the application of the Defendants, who were restrained by an interlocutory injunction in a case in which the Plaintiffs had undertaken to submit to any order which the Court might make for the early hearing of the cause, and where no appointment could be obtained for such examination before the Examiner for upwards of a month from the time of making the application: *Brennan v. Preston*, (App. p. xvii).

# APPENDIX.

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No. II.

## Cases on Chancery Procedure

DECIDED BY

SIR WILLIAM PAGE WOOD, KNT.,  
VICE-CHANCELLOR,

IN

EASTER AND TRINITY TERMS, 16 VICT., AND THE SITTINGS  
FOLLOWING.

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### Administration.

FORM of order for administration dispensing with the representatives of deceased executors and trustees as parties to the suit, although incapacitated persons were interested in the estate: *Whittington v. Gooding*, (App. p. xxix).

Legatees applying by petition for the payment of their legacies in an administration suit before or at the time the cause is heard for further directions, must pay the costs of all parties of such petition: *Edwards v. Hall*, (App. p. lxvi).

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In the Matter of MARY HOWKINS, deceased—June 13th, 1853.

MR. E. WEBSTER moved, on behalf of the executors of *Mary Howkins*, upon notice served upon the official manager of the *St. Marylebone* Joint-stock Banking Company, that the executors might be at liberty to set apart and appropriate the sum of 160*l.*, or such other sum as the Court should direct, to provide for the liability found by the report of Master *Senior*, dated the 22nd of December, 1852, and intituled "In the Matter of *Mary Howkins*, deceased," to attach to her estate, to answer calls in respect of the shares held by *Mary Howkins* in the said bank.

The executors had presented their petition under Sir *George Turner's* Act (13 & 14 Vict. c. 35, s. 23), and, on the 27th of March, 1852, obtained an order referring it to the Master to take the accounts in the form prescribed by the statute. On

A sum set apart on motion by the executor under Sir *Geo. Turner's* Act (13 & 14 Vict. c. 35, s. 23), to provide for an unascertained debt mentioned in the Master's report, the creditor not having appeared or established the liability before the Master, but having been served with notice of and appearing on the motion.

the 22nd of December, 1852, Master *Senior* made his report, and found that no person had proved any debt before him; but that, by the affidavit of one of the executors, he found that the following 'liability certain' affected the personal estate of *Mary Howkins*, viz.—he found that the personal estate of *Mary Howkins* was liable to the payment of some amount, but the extent could not at present be ascertained, in respect of certain shares held by her in the said bank, which said bank was being wound up under the Joint-stock Companies Winding-up Act, 1848, pursuant to an order of reference to the late Master *Kindersley*; and he found, that, under such last-mentioned order of reference, the name of *Mary Howkins* was, on the 27th of February, 1850, allowed by the Master, and by him placed on the list of contributories as the holder of four shares; and that no call had yet been made upon the contributories named in such list. The motion was intituled also "In the Matter of Sir *George Turner's* Act, of the Winding-up Acts, and of the *St. Marylebone* Joint-stock Banking Company."

The affidavits in support of the motion stated, that the debts of the bank were unascertained; that 40*l.* per share would, as they believed, exceed the liability of the testatrix's estate; that the personal estate of the testatrix did not exceed 1500*l.*; and that it was probable the litigation as to the affairs of the bank would not be concluded for a long time. The official manager filed an affidavit on the motion, stating his belief, that, from his knowledge of the debts of the Company, and of the position in life and circumstances of the [shareholders of the] Company, he believed that a call of less than 50*l.* a share on the contributories would not raise a sufficient sum to meet the liabilities thereof.

The 23rd section of the statute 13 & 14 Vict. c. 35, was referred to.

The VICE-CHANCELLOR said, that, as the official manager came in upon the motion, and stated the amount which he claimed to have reserved to meet the liability, as he might have done before the Master, the Court would make the order. The executors must set apart the 50*l.* per share; and they must pay the costs of the official manager.

## Affidavit.

USE of affidavits filed in support of a petition after the title of the petition has undergone alteration since the filing of the affidavits, and therefore differs from the title of the affidavits: *In the Matter of the Varley Iron Works Wesleyan Chapel*, (App. p. xxxvii).

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In the Matter of PICKANCE'S TRUST—*June 3rd*, 1853.

MR. SELWYN, in support of a petition under the Trustee Act, 1850, asked, that affidavits which had been made and filed in a cause in this Court, might be used as evidence of facts in this petition. The affidavits proved the pedigree of the parties.

Affidavits made in one cause or matter in this Court used as evidence in another cause or matter.

The VICE-CHANCELLOR received the affidavits as evidence on the petition.

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PEARSON v. WILCOX—*July 11th*, 1853.

THE affidavits had been sworn and filed under the title *Wilcox v. Pearson*, the names of the Plaintiffs and Defendants being reversed.

Affidavits erroneously intitled, allowed to be taken off the file and re-sworn in their proper title, without a fresh stamp.

Mr. *Hardy* moved for leave to take the affidavits off the file and re-swear them under the proper title of the cause, without affixing any other stamps than those which were already upon them.

The VICE-CHANCELLOR said, as there was not any cause in Court to which the affidavits as at present filed could be referred, he would make the order.

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## Amendment.

AS to a claim retaining its place in the paper, notwithstanding its amendment: *Pearson v. Wilcox*, (App. p. xi).

### Appearance.

ORDER giving leave to the Plaintiff to enter an appearance for the assignees of a bankrupt Defendant, made parties by a supplemental order, under the 52nd section of the stat. 15 & 16 Vict. c. 86, after due service of such order, and non appearance: *Cross v. Thomas*, (17 Jur. 336—M.R.).

After substituted service of an order to revive, obtained under the 52nd section of the stat. 15 & 16 Vict. c. 86, and made upon the solicitor of the Defendant under an order of the Court for that purpose, the Defendant being out of the jurisdiction—the Court, on the application of the Plaintiff, ordered an appearance to be entered for the same Defendant, who had not appeared: *Foster v. Monzie*, 9 May, 1853, (17 Jur. 657—M. R.).

Upon service on the Defendant of an order to revive, obtained by the Plaintiff under the 52nd section of the stat. 15 & 16 Vict. c. 86, after decree, the suit may proceed without an appearance by such Defendant: *Ward v. Cartwright*, (App. p. lxiii).

### Approval of Purchases and Titles.

*FORM of Order which has been settled for the re-investment in lands of purchase-money paid for the lands of incapacitated persons, &c., sold to Railway Companies or otherwise, and paid into Court under the Lands Clauses Consolidation Act and similar statutes.*

Purchase.	This Court being of opinion that the estate and premises in
Title.	the petition mentioned, situate &c., is a fit and proper purchase
Conveyance.	wherein to invest the sum of £——: Let an inquiry be made,
Execution.	whether a good title can be made to the said estate and pre-
	misses; and, in case a good title can be made, let a proper convey-
	ance of the said estate and premises be settled;—and, upon the
Payment.	due execution thereof by such parties thereto as shall for that
	purpose be named in the certificate of approval, such execution
	to be verified by affidavit: Let the said sum of £——, appear-
	ing by the certificate of the Accountant-General of this Court,
	dated the —— day of ——, to have been paid by the
	—— Company into the Bank, to the credit of ——, and
	being part of the sum of £—— cash in the Bank on the like
	credit, be paid to [ <i>the vendor</i> ] in the petition named; [ <i>or, in</i>
	<i>case the money has been invested in Bank Annuities</i> : Let so
	much of the £—— Bank 3l. per cent. Annuities, standing in the
	name of the Accountant-General of this Court, in trust ——,
	as with the sum of £—— cash in the Bank, on the like cre-
	dit, will be sufficient to raise the said sum of £——, be sold



with the privy &c., and one &c.: And let the money to arise by the said sale be paid to [*the vendor*] in the petition named, and for the purposes aforesaid, &c.:] And let, pursuant to the 80th section of the Lands Clauses Consolidation Act, 1845, upon the approval and execution of such conveyance, the said ——— Company pay unto the petitioner [*naming him*] his costs [if any remaining unpaid, including therein all reasonable charges and expenses incident thereto] of the purchase or taking of the lands in the petition mentioned by the said Company, or which have been incurred in consequence thereof, other than such costs as are by the Lands Clauses Consolidation Act otherwise provided for; [and] of the re-investment of the said money in the purchase of the land in the petition mentioned; [and] of obtaining the order [or several orders] made in this matter, dated the ——— day of ———; [and of this order], and of all proceedings relating thereto, except such costs (if any) as are occasioned by litigation between adverse claimants; And refer it to the proper Taxing Master to tax and settle the said costs, charges, and expenses [in case the parties differ].

Costs.

Costs of purchase.

Of re-investments in land.  
Of application.

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## Charity.

IF a Defendant to an information has any just ground for requiring the production of documents in the possession of the parties who are conducting the suit, he should apply to the Attorney-General: *Attorney-General v. Clapham*, (App. p. lxxviii).

A scheme for the administration of a charity ordered to stand over for consideration of the Attorney-General in the first instance: *In the Matter of Wyersdale School*, (App. p. lxxiv).

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### In the Matter of THE VARTOG IRON WORKS WESLEYAN CHAPEL—*May 6th*, 1853.

MR. BAGGALLAY, for the petition, applied for the appointment of new trustees. There had been originally nine, but the petitioners desired that thirteen should be appointed. They also de-

The rule which requires petitions for the appointment of new trustees of new trustees of case of a petition

charities to be intitled in the matter of Sir Samuel Romilly's Act, applies to the case of a petition for the appointment of trustees of a Wesleyan chapel.

Use of affidavits filed in support of a petition after the title of the petition has undergone alteration since the filing of the affidavits, and therefore differs from the title of the affidavits.

sired that the trusts should be declared to be in conformity with the trusts expressed in the instrument called the "model deed" of the Society.

The VICE-CHANCELLOR saw no objection to the proposed increase in the number of the trustees; but observed, that he could not, upon the petition, alter the trusts of the property. If the parties desired to apply the trusts of the "model deed" to this property, another proceeding must be taken for that purpose.

Leave was given to amend the petition, for the purpose of intituling it in *Sir Samuel Romilly's Act*, his Honour being of opinion that the rule on that subject applied to this case, as well as to any other charity.

Mr. *Baggallay* submitted to the Court that the necessity of reswearing all the affidavits under the new title would occasion much inconvenience and expense, and that it was very desirable that the Court should act on the present evidence.

The VICE-CHANCELLOR said, that the affidavits which had been sworn might be made evidence on the petition under the new title, by a short affidavit referring to them. They might be made exhibits.

In the Matter of THE BIERTON CHARITY LAND—*May 6th*, 1853.

Petitions for the appointment of new trustees of charity estates must be intituled in the matter of *Sir Samuel Romilly's Act*, and the fiat of the Attorney-General previously obtained.

MR. PITMAN, for the petitioners, who were churchwardens and other persons in the parish, applied for the appointment of new trustees of the lands of the charity. The foundation deed, which was of the date of 1681, provided that there should be fifteen trustees; and that, when the number was reduced to three, the three should fill up the number by the appointment of twelve others. No appointment appeared to have been made since the date of the original deed, and the last survivor of the trustees was unknown. The petition was intituled in the above matter, in the matter of the Trustee Act, 1850, and of the Act to extend the provisions of the Trustee Act, 1850, but was not intituled in the matter of *Sir Samuel Romilly's Act*.

Mr. *Wickens* mentioned the case of *Sarah Rolle's Charity* (see next case) in which the Lords Justices had held, that a petition for the appointment of new trustees of a charity must be so intituled.

The VICE-CHANCELLOR held that the title must be amended accordingly.

In the Matter of SARAH ROLLE'S CHARITY.

BY the foundation of this charity, certain lands were vested in three trustees, to pay the rents and profits to the then lord of the manor of *East Tytherley*, and the then rector and curate of the parish of *East Tytherley*, and the rectors of two neighbouring parishes, and three other persons, in trust to support and maintain a school for the benefit of the parish of *East Tytherley* and an adjoining parish; and the founder directed that the lord of the manor for the time being, and the said incumbents for the time being, should be standing trustees of the charity; and directed that a new trustee should be appointed in the place of either of the three other trustees who might die, or of their successors. The three elective trustees appointed had died many years since, and the time within which successors to them might be appointed, according to the founder's direction, had long since elapsed. A petition was now presented by the existing trustees, to appoint three others in the place of those who were elective. The trustees, in whom the property had been invested, were all dead, and it was uncertain which was the survivor. The petition was intituled in the matter of the Trustee Act, 1850, only. It was served upon the Attorney-General, but his fiat had not been obtained before it was presented. See preceding case.

Mr. *Fooks*, for the petitioners, asked for the appointment and vesting order under the 32nd and 34th sections of the Trustee Act, 1850.

Mr. *Wickens*, for the Attorney-General, objected, that the petition should have been intituled in the matter of Sir *Samuel Romilly's* Act, and that the fiat of the Attorney-General was necessary previously to its presentation. He mentioned a case at the Rolls, in which the Master of the Rolls had considered that to be the proper course.

The point being deemed to be one on which the practice of the Court ought to be settled, it was arranged that the case should be submitted to the Lords Justices.

BEFORE THE LORDS JUSTICES—*March 21st, 1853.*

Mr. *Fooks* cited *In the Matter of Nightingale's Charity* (3 Hare, 336).

The LORDS JUSTICES, without hearing Mr. *Wickens* for the Attorney-General, held that the petition must be intituled in the matter of Sir *Samuel Romilly's* Act, and that the fiat of the Attorney-General must therefore be obtained.

### Claim.

A CLAIM will not be ordered to be taken pro confesso against an absconding defendant under the provisions of the statute 1 Will. 4, c. 36, s. 4, for taking bills pro confesso: *Henderson v. Thomas*, (App. p. lxxvii).

#### PEARSON v. WILCOX—June 4th, 1853.

As to a claim retaining its place in the paper notwithstanding an amendment.

MR. *HARDY* asked for leave to amend a claim, and that it might keep its place in the paper. The new facts arose out of the Defendant's affidavits, and therefore would not be a surprise.

The VICE-CHANCELLOR said, the Plaintiff might amend the claim, as on amendment it must be served on the Defendant; but he could not, on an ex parte application, order that it should keep its place in the paper. The amended claim would be a new claim, and would be set down in its regular course. If, however, the Defendant should consent, he would allow the claim to keep its place.

#### EWINGTON v. FENN—July 26th, 1853.

Exceptions are necessary in order to object to reports on claims as well as to reports on bills.

MR. *BEVIR* appeared in support of a petition, which objected to certain allowances that the Master had made in his report. The reference had been made on a claim, which was stated to be the explanation of the proceeding by petition and not by exceptions.

The VICE-CHANCELLOR said, that exception to the report was equally the necessary and proper form of proceeding, whether the suit was by bill or claim.

#### HOLFORD v. YATE—July 18th & 19th, 1853.

A mortgagee held not to be chargeable with the increased costs occasioned by his proceeding for foreclosure by bill and not by claim.

A FORECLOSURE suit, instituted by bill, since the General Orders of the 22nd of April, 1850, came into operation.

Mr. *Selwyn* and Mr. *Cairns*, for the Defendants, contended, that the additional costs occasioned by this form of suit, which had involved the necessity of answers being put in by the Defendants, should, under the 32nd of those Orders, be paid by the Plaintiff. If the Plaintiff were not made answerable in costs,

any Plaintiff in such a case might take upon himself to disregard the Orders of the Court.

Mr. *Craig* for the bill said, that there were two reasons for proceeding by bill: first, that one of the Defendants was residing in *Italy*, and out of the jurisdiction (see *Marshall v. Hutchinson*, App. p. lxviii, n.); and, secondly, that in a proceeding by claim, without any discovery, the foreclosure might be wholly ineffectual, owing to the existence of undisclosed incumbrances: *Robinson v. Turner* (9 Hare, 129, 488).

The VICE-CHANCELLOR said, that, adverting to the necessity of ascertaining whether subsequent incumbrancers existed, in order to make them parties and render the suit effectual, he could not hold that the Plaintiff must pay the additional costs, merely because he had not proceeded by way of claim.

### Conduct of Cause.

A DEFENDANT, after a decree, may file a supplemental bill to add parties, and otherwise duly prosecute the decree: *Lee v. Lee, Lys v. Lee*, (App. p. lxx).

### Consolidation of Suits.

WHERE divers contracts had been made for the sale of different parts of a settled estate by a father and son having a joint power of appointment over the estate, and the completion of such contracts was prevented by the same accident, namely, the death of one of the two vendors; several of the purchasers and sub-purchasers under such distinct contracts joined as Plaintiffs in the same suit, and the parties interested in the estate not objecting for multifariousness, the Court decreed the specific performance of the different contracts in one suit: *Hargreaves v. Wright*, (App. p. lvi).

### Contempt.

REEVE v. HODSON—*June 30th, 1853.*

MR. WIGRAM moved for an order, that the Plaintiff should not proceed to the trial of the issue directed in this cause, unless he should, on or before the 1st of July, pay the costs directed to the trial of an issue until the Plaintiff should pay costs, for nonpayment of which he was in contempt, the Plaintiff being at the same time under terms to try the issue at the next assizes—the Court the Plaintiff an enlarged time for proceeding to trial, but made his right conditional on the payment of such costs.

On an application by the defendant to proceed the Plaintiff was in contempt—the Court on the payment of such costs.

be paid by the order of the 21st of April, 1853(a); and that, in case of non-payment, the issue might be taken as if tried and a verdict found for the Defendants, and that the Plaintiff might thereupon be ordered to pay the costs of the suit, including the costs of this application. An attachment had been issued for the costs, and the Plaintiff was in contempt. The indulgence granted by the last order must be regarded as conditional on the payment of costs.—They cited *Bradbury v. Shaw* (14 Jur. 1042).

Mr. *Rolt* opposed the motion.—*Bradbury v. Shaw* was founded wholly on *Wilson v. Bates* (3 Myl. & Cr. 197); and neither of the cases afforded any authority for the present motion. The Plaintiff was under terms to proceed with the trial of the issue, or it would be taken pro confesso against him; and in that state of things the Defendants now applied that the Plaintiff should not be allowed to go to trial unless he should pay the costs. It was an attempt to make the necessity of the Plaintiff to go on with the case, the means of extorting the payment of the costs. It was rather analogous to those cases in which a party, notwithstanding his contempt, was permitted to defend himself from an adverse step taken by his adversary: *King v. Bryant* (3 Myl. & Cr. 191).—He cited also Archbold's Practice as to the rule at law in cases of nonsuit and a new trial, and cases in which the record is withdrawn.

VICE-CHANCELLOR.—I think the justice of the case clearly is, that the Defendants should not be put to any more expense until the expenses to which they have already been put shall have been paid. The case of *Wilson v. Bates* turned on a different point. The Plaintiff was in contempt for non-payment of costs, and sued out an attachment against the Defendant for not putting in his answer. No step had been taken to prevent the Plaintiff from obtaining the order for the attachment; and the only question was, whether what he had done was regular or irregular. The Lord Chancellor held it not to be irregular, but recognised the rule which I have always considered to apply to this subject. The rule which prevents a party in contempt from proceeding in his cause admits of two exceptions—one where the party is applying to get rid of the process by which he has been placed in

(a) See *Reeve v. Hodgson*, supra, p. xxiv.

contempt, and the other where he is merely defending himself from any proceeding of his adversary. In other cases, where a party is himself proceeding actively, being at the same time in contempt, the adverse party may stop him until he shall clear his contempt. The present case is of a mixed kind. The Plaintiff, on the one side, is conducting the suit actively for his own benefit; and the Defendants, on the other side, are in effect applying adversely against him, for the purpose of getting rid of the suit if he does not proceed. When the order of April last was made, it would not, I think, have been unreasonable to have given the liberty to proceed to trial at the next assizes, upon condition that the costs should be paid. That, however, is not the form of the order which was then made; and, as the case stands, I think the Plaintiff comes in some measure within the rule, which permits a party to defend himself notwithstanding his contempt. Looking at the circumstances, and at the fact shewn by the affidavits, that the expense of a non-effectual trial at law amounts to 200*l.*, and that the taxation of these costs was not completed until the 14th of June, I think the proper order will be, that the Plaintiff shall not proceed to trial until he shall have paid the costs directed to be paid by the last order; but that, peremptorily, he shall proceed to trial, at the latest, at the next Spring Assizes, or, in default, shall be subject to the consequences mentioned in the former order.

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Notice of trial having been previously given, it was arranged, that, if the costs should not be paid before 12 o'clock on the 5th of July, the trial should not take place at the present Summer Assizes.

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### Costs.

ON an application by the Defendant to stay proceedings of the Plaintiff in the trial of an issue until the Plaintiff should pay costs, for non-payment of which he was in contempt, the Plaintiff being at the same time under terms to try the issue at the next assizes, the Court gave the Plaintiff an enlarged time for proceeding to trial, but made his right conditional on the payment of such costs: *Reeve v. Hodson*, (App. p. xli).

Practice of the Taxing Master's offices as to the taxation of costs, where the warrants to proceed with the taxation do not require to be served, or where service is dispensed with: *In the Matter of Harvey's Settlement*, (App. p. lxxv).

See Form of Order for the reinvestment in lands of purchase-money paid for th

lands of incapacitated persons, &c., sold to Railway Companies or otherwise, and paid into Court under the Lands Clauses Consolidation Act, &c. *Approval of Purchases and Titles*, (App. p. xxxvi).

THE MIDLAND RAILWAY COMPANY v. BROWN—April 23rd & 30th, 1853.

Where the Taxing Master had refused to allow the briefs of more than two counsel on the taxation of costs between party and party—the Master having exercised his discretion by looking into the circumstances of the case, and not having relied wholly on the general rule—the Court refused to disturb the certificate.

A PETITION to review the certificate of the Taxing Master, who had disallowed the fees of one of three counsel retained for the Defendant both on a motion and at the hearing of the cause. The reasons assigned for delivering briefs to a third counsel were, that the case depended on evidence which was very voluminous; and that, after the cause had been in the paper and stood over, the junior counsel for the Defendant was called within the bar; and that it was therefore necessary to instruct another counsel.

Mr. Rolt and Mr. E. F. Smith for the petition.

Mr. Willcock and Mr. Speed contra.—*Sharpe v. Ashby* (12 M. & W. 732); *Attorney-General v. Munro* (1 Mac. & G. 213, 1 Hall & T. 457, S. C.); *Carter v. Barnard* (16 Sim. 157); *Green v. Briggs* (7 Hare, 279); *Downing College case* (3 Myl. & Cr. 474); and *Friend v. Solly* (10 Beav. 329), were cited.

The VICE-CHANCELLOR said, that he had ascertained, from a communication with the Taxing Master, that he was perfectly aware of the case of *Carter v. Barnard*, and had fully considered the grounds upon which the costs of retaining three counsel for the Defendant had been claimed. The principle on which the Court acted was, that a party could not put his adversary to an expense which was not really necessary in the conduct of the cause. There might, no doubt, be cases where it would be absolutely necessary to the proper conduct of a suit, that additional briefs should be delivered: it might happen from the death of counsel in the progress of the suit, or from the occurrence of some event rendering a departure from the usual rule indispensable. In this case, the Taxing Master had considered the question with reference to the magnitude of the case, and he had come to the conclusion that the additional briefs ought not to be allowed as costs to be paid by the adverse party; and he thought the Court should not open the certificate.



## Cross Bill.

THE 20th section of the stat. 15 & 16 Vict. c. 86, does not extend to enable a Defendant to obtain an order for the production of documents in the possession of a co-Defendant. In such a case a cross bill may still be necessary: *Attorney-General v. Clapham*, (App. p. lxviii).

## Decree.

DECREE for foreclosure of the estate of a married woman should be in the ordinary form, and ought not to be made absolute at once, even by consent: *Harrison v. Kennedy*, (App. p. li).

## Depositions.

ORDER to read, on the trial of an issue, the depositions of a living witness, taken in a suit to perpetuate testimony, the witness being too infirm to attend at the trial: *Watkins v. Atchison*, (App. p. xlvi).

## Evidence.

ON an inquiry directed to be prosecuted in Chambers, witnesses, who had been examined before the hearing upon interrogatories, were examined again *vivâ voce* as to the same matters: *Rogers v. Mort*, (App. p. liii).

Affidavits made in one cause or matter in this Court used as evidence in another cause or matter: *In the Matter of Pickance's Trust*, (App. p. xxxv).

A special motion is not necessary in order to obtain a subpoena ad testificandum, where the object is to procure the attendance of a witness or party at the hearing of the cause; nor is there anything in the case of *Smith v. Swansea Dock Company* (9 Hare, App. xx.) from which it is to be inferred that such a motion is proper: *May v. Biggenden*, (17 Jur. 252—V. C. Stuart).

Upon a motion for a decree, after the affidavits on both sides had been filed, and the Plaintiff had made an affidavit in reply, the Defendant was permitted to cross-examine the Plaintiff, under the 40th section of the stat. 15 & 16 Vict. c. 86: *Williams v. Williams*, (17 Jur. 434—M. R.).

An order for the special appointment of an Examiner may be obtained by summons at Chambers, *semble*: S. C.

The 22nd section of the stat. 15 & 16 Vict. c. 86, does not enact that the Judges of the Court of Chancery shall take judicial notice of the signature of a

person who is a public officer in a colony, but is not a judge or notary public, and is not lawfully authorised to administer oaths in such country: *Baillie v. Jackson*, (17 Jur. 170—L. C).

The Examiner of the Court, or a special Examiner, will be appointed to take the examination of a sick witness, as occasion may require: *Pillay v. Thompson*, (App. p. lxxvi).

WATKINS v. ATCHISON, ATCHISON v. LE MANN—*June 25th*,  
1853.

Order to read on the trial of an issue, the depositions of a living witness taken in a suit to perpetuate testimony, the witness being too infirm to attend at the trial.

The Defendant having obtained an order for the payment of his costs by the Plaintiffs, which order recited that the testimony of the witness had been taken, the depositions of the witness must be regarded as having been completely taken,—and are not therefore to be excluded on the ground of the want of a sufficient cross-examination.

AT the hearing of the suit of *Atchison v. Le Mann*, on the 15th of March, 1853, two issues were directed, to try, first, whether *Robert Embleton Atchison*, the Plaintiff in that suit, is the heir-at-law ex parte maternâ of *W. J. W. Watkins*, deceased, the same to be tried in the county of *Northumberland*; and secondly, whether *James Watkins*, one of the defendants in that suit, is the heir-at-law ex parte paternâ of the said *W. J. W. Watkins*, the same to be tried in *London*. *James Watkins* and another of the Defendants in that suit thereupon filed a bill against *Robert Embleton Atchison*, stating that the allegation of *Robert Embleton Atchison* was, that the father *W. J. W. Watkins* and the now Plaintiff *James Watkins* were illegitimate sons of *W. Watkins* by *Mary Ann Sedgwick*, meaning *Mary Ann Watkins*; that the said *Mary Ann Watkins* was a most material witness for the present Plaintiffs, that she was of the age of seventy-seven years or thereabouts, and resided at *Chelmsford*, in *Essex*; and by reason of her great bodily infirmity (being for some time past bedridden), it would be impossible for her to be produced as a witness at the trial, and the plaintiffs could not, therefore, have the benefit of her testimony without the assistance of the Court; and praying that the Plaintiffs might have the said *Mary Ann Watkins* examined, and her testimony recorded in this Court, in order that the same might be used on their behalf on the trial of the said issue, whether the Plaintiff *James Watkins* is the heir ex parte

On the examination and cross-examination of an aged and infirm witness labouring under deafness, the questions were put, and answers received, through the medium of the daughter of the witness; and the Examiner certified that the state of the witness did not permit the examination to be proceeded with without danger to her life; and that much of the cross-examination, and all the re-examination, had been pretermitted. The Defendant afterwards obtained an order for his costs, which recited that the testimony of the witness *had been taken*:—*Held*, that the Defendant, having concurred in the mode of examination adopted, could not afterwards object to the use of the testimony by impeaching its fidelity on that ground.

materna of *W. J. W. Watkins*, and in order to the perpetuity thereof, so that the Plaintiffs might have the benefit thereof at any other time when there should be occasion. On the motion of the Plaintiffs, an order was made on the 28th of April, for the appointment of a barrister (to be selected by the parties) to take the examination of *Mary Ann Watkins* vivâ voce. The depositions of the witness were taken in the presence of counsel on both sides; and, at the foot of the depositions, the gentleman who had been selected as Examiner, made the following certificate or return:—"This witness could not, without much difficulty, be made to hear or understand the questions put to her, and then only when they were put by her daughter, with whose voice she appeared somewhat familiar. When the witness understood the question, her reply was given with some vivacity, but this occasioned a temporary prostration of the system. After a while, however, she was again able to be examined for a little, but it was evident that life was ebbing away; and it was, therefore, not only with difficulty, but some degree of danger to the witness, that the examination was pursued so far. By the consent of both parties, the reading over of the depositions to the witness was, under these circumstances, dispensed with; and at their request I have to state, that, for the same reasons, a great part of the cross-examination, and the whole of the re-examination, were pretermitted.—W. MORRIS."

After the return of this examination, the Defendant moved for the costs of the suit, and the following order was made:—"Upon motion this day, made &c., by &c., for the Defendant—It was alleged, that, the Plaintiffs having exhibited their bill against the Defendant, and the testimony of the witness, to examine whom this bill was filed, having been taken, and the Defendant not having examined any witnesses, it was prayed, that the Plaintiffs should pay unto the Defendant his costs of this suit:—which is ordered accordingly; and it is hereby referred to the Taxing Master, &c." (a).

On the 23rd of June, the Plaintiffs in this suit moved that the depositions of *Mary Ann Watkins*, taken under the said order,

(a) The motion for this order was made upon notice. The Plaintiffs did not appear; and it was stated, that, in the taxation of costs, the costs connect-

ed with the service were disallowed, on the ground that it was properly a motion of course.

filed on the 3rd of May, might be read as evidence for *James Watkins* on the trial of the issues.

The motion was opposed by the Defendant, and an affidavit was filed on his behalf, to the effect that the depositions of *Mary Ann Watkins*, having been taken through the medium of her daughter as stated by the Examiner, had been greatly influenced by her daughter, and were in fact, in many respects, rather the answers and suggestions of her daughter than of herself.

It was not suggested by the affidavits, that there was any probability that the witness (although still alive) could be produced for examination at the trial of the issue.

Mr. *Daniel* and Mr. *Joliffe* for the motion.

Mr. *Craig* and Mr. *Welford*, contra, contended, that, the cross-examination not having been completed, the case should be considered as in the same position as that of a witness who had died after his examination in chief and before cross-examination; and that in such case the evidence of the witness could not be used. They contended, moreover, that the bill ought not to have been in the form of a bill to perpetuate testimony, but of a bill for the examination of a witness *de bene esse*: *Morrison v. Arnold* (19 Ves. 671).

VICE-CHANCELLOR.—It is not now material to discuss the question, whether the bill should have been for the perpetuation of testimony, or for the taking of evidence *de bene esse*. There has been no demurrer to the bill; the parties have acted upon it; and the Defendant has applied for and been paid his costs: it is therefore much too late for him to say, that the form of proceeding was erroneous.

The question now is, whether I am to hold, that the examination of the witness has been incomplete, and that, therefore, it ought not to be used. On the first point, my opinion would perhaps be in favour of the Defendant, if the form in which the parties obtained the certificate of the Examiner, had been such as to shew that the examination or cross-examination had been incomplete, and that the Defendant had desired to prosecute it further. The phrase, however, is, that the further cross-examina-

tion and re-examination were "pretermitted." This may admit of two interpretations. It may mean, either that the examination was left incomplete, and that the Defendant intended, if possible, to resume it; or it may mean that the Defendant, seeing the infirmity of the witness, and having taken her answers to many questions by way of cross-examination, intimated that, all things considered, he would not pursue the examination any further. The Defendant did not, indeed, expressly intimate this, but he has done what is, I think, equivalent to it. He might have gone to the Examiner, and told him, that he did not wish to prosecute further the examination of the witness, or he might have taken the step of coming to this Court in a form which would substantially conclude the proceeding. Now, the Defendant took the latter course, he applied to the Court by motion, and obtained an order for costs, founded on the recital of "the testimony of the witness, to examine whom this bill was filed, having been taken." This must mean, that the complete examination, or what the Defendant was content to take as the complete examination, had been taken. It cannot, after that, be contended by the same Defendant, that the cross-examination is incomplete, and that the examination is not, therefore, to be used. By that application, the Defendant, in effect, has informed the Plaintiffs that he is satisfied, and that he will take his costs. I am of opinion, that the Defendant, by this step, must be taken to have adopted the cross-examination, and that it must be considered as completed.

The other objection raised by the affidavit of the Defendant is, that the examination was taken in such an imperfect manner, and through such a medium and intervention, that the Court will not allow it to be used. It is stated, that the witness was so deaf, that she could only be made to hear and comprehend the questions by a voice with which she was familiar, and that the questions were put to her through her daughter; and the evidence so taken is impeached by faintly suggesting fraud by the witness and her daughter affecting the testimony given by the witness. This objection, however, comes too late. If the Defendant had not been satisfied with the mode of taking the evidence through the intervention of the daughter, he should have immediately objected, and insisted upon having it taken in the common way, directly from the mouth of the witness; and, if necessary, he

might have applied to the Court, alleging that he was not able to proceed with the cross-examination, either because the witness did not hear the questions, or because she refused to answer them, or whatever the fact might be. But, instead of doing this, it appears by the Examiner's certificate, that the Defendant concurred in the mode of examination which was adopted; and it does not appear that he made any objection to it. I cannot, therefore, on the ground suggested by these affidavits, hold that the Plaintiffs ought not to be allowed to use the testimony so taken. I think it would be a surprise, or even fraud, upon the Plaintiffs, if the Defendant could now succeed in excluding the depositions on this ground.

The Examiner has, in this case, taken the prudent course of certifying the incidents which occurred in the examination, which is what the Court would desire the Examiner in all cases to do. The jury, on the trial of the issue, will have before them in evidence, the fact that, from the state of health of the witness, a part of the cross-examination and the re-examination of the witness were pretermitted. I shall make the order which is asked; but I think the costs of this application must be paid by the Plaintiffs, for whose benefit the evidence is taken.

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### Exceptions.

EXCEPTIONS are necessary in order to object to reports on references on claims, as well as to reports on references in suits by bill: *Livingston v. Fess*, (App. p. xi).

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### Foreclosure.

A MORTGAGEE held not to be chargeable with the increased costs occasioned by his proceeding for foreclosure by bill and not by claim: *Holford v. Yate*, (App. p. xi).

Decree for foreclosure, under the stat. 15 & 16 Vict. c. 86, s. 42, rule 9, against the devisees in trust and executors of the mortgagor, being all the persons who had control over the property out of which the mortgage was to be satisfied, in the absence of the cestuis que trustent under the will of the mortgagor: *Sale v. Kitson*, (17 Jur. 170—L. JJ).

The Court refused to act on the 15. & 16 Vict. c. 86, s. 42, rule 9, dispensing with the parties beneficially interested, in a suit for foreclosure against the infant heir-at-law of the mortgagor, where the devisees in trust under his will had disclaimed, and no adult parties who would be in possession of funds to redeem were before the Court as Defendants: *Young v. Ward*, (App. p. lviii).

**HARRISON v. KENNEDY**—*June 3rd, 1853.*

A SUIT for foreclosure. Two of the Defendants entitled to the equity of redemption were married women.

Decree for foreclosure of the estate of a married woman must be in the ordinary form, and ought not to be made absolute at once, even by consent.

Mr. *Hislop Clarke*, for the Plaintiff, said, that the amount of the principal and interest due would be verified by affidavit, and the Defendants would appear and consent to an immediate order absolute for foreclosure.

The VICE-CHANCELLOR said, that the Defendants, the married women, were not competent to consent to an order passing their equitable interests in the estate. His Honour at first thought the affidavit as to the amount due might obviate the necessity of directing the account to be taken; but, after communication with the Registrar, he directed the order for the account, and foreclosure in default of payment, in the usual form.

**MEARS v. BEST**—*July 1st, 1853.*

A FORECLOSURE suit. The mortgaged property consisted of some cottages at *Windlesham*, near *Chobham*. The cottages were of small value, not exceeding 200*l.*; let to weekly tenants at rents of 2*s.* 6*d.* a week each. The evidence shewed that there were local and temporary circumstances affecting the present marketable value of the property, which rendered it very desirable, for the benefit of the infant Defendants on whom the interest of the mortgagor had devolved, that the property should be sold without delay; and

Direction for sale of an infant's estate in a foreclosure suit (under circumstances shewing it to be clearly for the benefit of the infant) without giving time to redeem.

Mr. *Southgate* asked for an immediate decree for sale, without giving time to redeem, under the discretion vested in the Court by the stat. 15 & 16 Vict. c. 86, s. 48.

The VICE-CHANCELLOR, under the special circumstances shewn

to exist in this case, thought it one in which the Court might exercise its discretion in the manner asked, and made the order for sale forthwith.

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### Forma Pauperis.

THE Court discharged an order obtained *ex parte*, enabling a married woman to sue in *forma pauperis*, in respect of her separate estate, without the intervention of a next friend: *In re Page*, (17 Jur. 336—M. R.).

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### Guardian ad Litem.

APPLICATION for the appointment of a guardian to concur in a special case, made in Court, and not by summons at Chambers: *Thorhill v. Copleston*, (App. p. lxvii).

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### Inquiries.

PRICHARD *v.* NORRIS—*June 2nd*, 1853.

Inquiries directed by the decree transferred to Chambers, upon the Master making a separate report as to part of the matters referred to him, where questions of law arose upon the other matters involved in the reference.

MR. ROLT and Mr. Eddis moved, by consent, in a residuary legatee's claim for administration, where inquiries as to the next of kin of the testator had been directed by an order of the 30th of July, 1852, that, upon the Master to whom the cause stood referred making a separate report or certificate upon the preliminary inquiries, and the inquiry as to the debts of the testator referred to him by the order, the further prosecution of the inquiries directed by the said order to be taken and made, might be proceeded with before the Vice-Chancellor in Chambers.

The reason assigned for the application was, that, upon the general report, many legal questions would arise, which it would be impossible finally to decide, without bringing them before the Court by exceptions. The Master had approved of the application.

The VICE-CHANCELLOR said, the principle of the Act had been to leave the old causes to be prosecuted before the Masters. However, as the parties desired the proceedings to be transferred, and there had been some other cases in which it had been thought right to make a similar transfer, he would make the order.



ROGERS v. MOET—June 7th & 8th, 1853.

ON a bill to establish an equitable mortgage, the Court directed an inquiry whether Messrs. *Pass & Shelmerdine* had any authority, other than the authority alleged to have been given by the memorandum of the 15th of July, 1835, to make the security by deposit of the title deeds mentioned in the bill; and if so, when and how, and by whom, and under what circumstances such authority was given. In the prosecution of this inquiry several witnesses were examined before the Vice-Chancellor at Chambers, by leave obtained, notwithstanding the witnesses had been examined as witnesses in the cause before the original hearing.

On an inquiry directed to be prosecuted in Chambers, witnesses who had been examined before the hearing upon interrogatories were examined again *vivâ voce* as to the same matters. (See 2 Dan. Chanc. Pr., Headlam's ed., 1140 et seq.)

The chief clerk certified that the result of the inquiries which had been made in pursuance of the decree in this cause, dated the 26th of February, 1852, and which inquiries had been made in the presence of the solicitor of the Plaintiff, and of the respective counsel and solicitors of the several Defendants, except the Defendant *Früh*, whose solicitor had attended on the settling of the certificate, was as follows: *W. Pass* of &c., and *W. Walkden* of &c., one of the said Defendants, being witnesses produced by and on the part of the Plaintiff, and who had been already examined on the Plaintiff's behalf upon interrogatories filed in this cause, had been examined upon oath *vivâ voce* before the said Judge touching the said inquiries; and the examination of the said witnesses was contained in a copy of the short-hand writer's notes thereof, signed by the said Judge, and which, by consent of the several parties, was to be taken as containing correct notes of the evidence given; and the said Judge having, at the request of the several parties attending, adjourned the consideration of the evidence till this cause should be heard on further directions, he had, at the request of the same parties, forborne to state further the result of the inquiries directed by the said decree.

Proceeding by inquiries in Chambers and by certificate in a case where the consideration of the result of the evidence was adjourned for argument in Court.

The case was upon this certificate set down in the paper, on further consideration, and the result of the evidence was then discussed, and the decree in the cause made.

## Motion.

A SUM set apart on motion, by the executor, under Sir *George Turner's Act* (13 & 14 Vict. c. 35, s. 23) to provide for an unascertained debt mentioned in the Master's report, the probable creditor having been served with notice, and appearing on the motion: *In the Matter of Mary Howkins, deceased*, (App. p. xxxiii).

Order to pay money into Court at the hearing, under the new practice, without a notice of motion for that purpose: *Isaacs v. Weatherstone*, (App. p. xxx).

Costs of an abandoned motion are to be applied for at the seal or motion day next after the day for which the notice of motion was given, if application be not made by the party moving to save the motion until a future day: *Woodcock v. The Oxford, Worcester, and Wolverhampton Railway Company*, (17 Jur. 33—V. C. *Kindersley*).

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## Motion for Decree.

AT the time the notice of motion for a decree is given under the 15th section of 15 & 16 Vict. c. 86, and the 22nd General Order of the 7th of August, 1846, the Plaintiff should set the cause down with the Registrar; and if he omits to do so until after the expiration of the month, the Court will not order the cause to be set down except upon motion with notice to the Defendant: *Boyd v. Jagger*, (17 Jur. 655—L. C. & L. JJ., 20 July, 1853).

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### AMES v. AMES—July 19th, 1853.

A motion for a decree in a fit case may be set down for hearing as a short cause.

MR. *BACON* applied, that a motion for a decree, as to which the month had expired, and which would in due course be in the paper within a day or two, might be advanced by consent of all parties. It was not an opposed matter.

The VICE-CHANCELLOR said, that, if it were fit to be heard as a short cause, it might be set down accordingly, without the necessity of an application to the Court.

LOINSWORTH v. ROWLEY—*July 19th, 1853.*

A MOTION for decree. The month's notice had not expired; but all parties consented that it should be immediately set down for hearing.

A motion for a decree may be heard by consent before the time fixed by the General Order for motion has expired.

Mr. *Piggott* asked that the motion should be placed in the paper the next short-cause day: which was ordered.

MEER v. WARD—*May 5th & 23rd, July 15th, 1853.*

THE Defendant was served with the printed bill out of the jurisdiction; but did not appear. An appearance was entered for him by the Plaintiff, under the 33rd General Order of May, 1845; and

Notice of motion for a decree, under the 15th section of the stat. 15 & 16 Vict. c. 86, may be served on a Defendant out of the jurisdiction.

Mr. *Prior* now applied for leave to serve the Defendant out of the jurisdiction with notice of motion for a decree.

The VICE-CHANCELLOR, having mentioned the point to others of the Judges, gave leave to serve the notice of motion accordingly.

The order for leave to serve the notice out of the jurisdiction is to be drawn up and served, and is to specify the time allowed for filing affidavits in reply.

A question afterwards arose in the Registrar's Office, whether it would be sufficient to indorse on the brief of counsel that leave had been given; or whether the order should be drawn up and served on the Defendant; and also, whether a time should be fixed in the order for filing affidavits, corresponding with the distance from the Court at which the Defendant might be residing. It was also suggested, that, at the time of serving the notice of motion, copies of the affidavits filed by the Plaintiff should also be served.

The VICE-CHANCELLOR, without laying it down, that, in all cases, copies of the affidavits should be delivered when the notice of motion was served out of the jurisdiction, in this case, as the Plaintiff had completed his evidence, and was ready to serve copies of the affidavits, ordered that the Defendant (who was in *America*) should be served with the copies of the affidavits, should have six weeks for filing his affidavits in reply, and (the

long vacation being at hand) that the notice of motion should be given for Michaelmas Term,—the order for leave being drawn up and served as well as the notice.

### Multifariousness.

HARGREAVES v. WRIGHT—December 10th, 1852; June 6th, 1853.

The Court refused to make a decree in a suit for specific performance of several contracts for the purchase of lands by some on behalf of themselves and all others of the purchasers, although the lands were held by the vendors under the same title, and the contracts were made under the same circumstances, and their completion was prevented by the same accident, namely, the death of one of the two vendors who had a joint power of appointment; but several purchasers and sub-purchasers under such distinct contracts having joined as co-plaintiffs in the same suit, and the parties interested in the estate not objecting for multifariousness, the Court decreed the specific performance of the different contracts in one suit.

THE estates to which the question related were settled by deeds, dated in 1836, giving *G. Wright* and *C. S. Wright* a joint power of appointment; and, subject to that power, limiting such estates to the use of *G. Wright* for his life, with remainder to *C. S. Wright* for his life, with remainder to the first and other sons of *C. S. Wright* in tail, remainders over.

*G. Wright* and *C. S. Wright* contracted with several persons for sale of different parts of the estates. Before the purchases were completed, and in December, 1850, *C. S. Wright* died, leaving his eldest son and some younger children, all infants. A special case (*Wright v. Woodhead*) was brought before the Court on behalf of the parties interested in the estates under the settlement, to which a purchaser, with whom one of the contracts had been entered into, was a party; and, upon this case, the Court(a) declared that the parties interested in the estates, subject to the joint power of appointment, were bound by the contracts, and were trustees for the purpose of carrying the same into effect. That the purchase-money received by *G. Wright* and *C. S. Wright*, in respect of certain similar contracts for sale, which had been completed in their lifetime, were, under the circumstances appearing in the evidence, subject to be re-invested in other lands, to be conveyed to the same uses as those to which the lands sold had previously stood settled. In order to obtain the directions of the Court on the question to whom the purchase-money was to be paid, and also to obtain a decree that all proper parties should join in the conveyance, a bill was filed by *Hargreaves* and another, two of the purchasers under an agreement with *G. Wright* and *C. S. Wright*, dated the 11th of December, "on behalf of themselves and

(a) 29th April, 1852, before Sir *G. J. Turner*, V. C.

all other persons claiming to be entitled to enforce specific performance of contracts for the sale to them of lands held under the same title as the lands comprised in the said agreement, (and which contracts were made by or by the duly authorised agent or agents of the Defendant *G. Wright*, and *C. S. Wright* deceased, and were then unperformed, either in whole or in part,) who should be willing to come in and to contribute to the expenses of the suit" against *G. Wright* and the other persons interested under the settlement. The bill prayed the specific performance of the said several contracts, and a conveyance by the adult Defendants, and the appointment of a person to convey on behalf of the Defendants who were infants; and that the estate might be discharged from the interests of unborn persons who might become entitled under the settlement; and general relief.

1852.  
Dec. 10th.

Mr. *Rolt* and Mr. *Metcalf*, for the plaintiffs, submitted that the Court would, to avoid a multiplicity of suits, and for the benefit of the parties interested in the estate, make one decree applicable to all the contracts. The circumstances were substantially the same; and, although the form of suit was unusual, yet the Court had recognised and acted on the principle of adapting its practice to the exigencies of new cases and the convenience of suitors, where substantial justice would be done. The case might be likened to a creditors' suit by one creditor on behalf of all.

The VICE-CHANCELLOR (a) said, that each contract was in its nature distinct, and must stand upon its own circumstances. A decree in a suit by one on behalf of other several contractors entitled to the performance of distinct contracts would be dealing with matters not in issue, and would be, in fact, wholly to dispense with the forms of the Court. If several purchasers would join as co-plaintiffs, and no party in the cause should object on the ground of multifariousness, the Court might make a decree on behalf of all the Plaintiffs.

His HONOUR allowed the suit to stand over, with leave to amend.

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The bill having been amended, several purchasers and sub-

(a) Sir *G. J. Turner*.

purchasers under nine distinct contracts were added as co-Plaintiffs. The bill set out the different contracts, and the declaration of the Court on the special case, and prayed a declaration that the several contracts ought to be specifically performed, (each Plaintiff offering to perform his respective contract on his part); and it prayed a decree for a conveyance to the Plaintiffs respectively, or as they should direct, of the lands comprised in their respective contracts; and that, if necessary, the said lands might be discharged from the interests of such unborn persons, who, if born, would be entitled to interests therein under the limitations of the settlement; and that all proper directions might be given for re-investing or otherwise disposing of the purchase-moneys.

Mr. *Rolt* and Mr. *Metcalf* for the Plaintiffs, and

Mr. *W. H. Clarke* and Mr. *Warren* for the Defendants.

1853.  
*June 6th.*

The VICE-CHANCELLOR, upon the amended bill, made the decree substantially in the form in which it was prayed by the bill.

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## Parties.

DECLARATION made on the question, whether children took per capita or per stirpes, in the absence of the personal representatives of some of the children who had died. *Abrey v. Newman*, (17 Jur. 153—M. R.).

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## YOUNG v. WARD—*July 8th*, 1853.

In a suit for foreclosure against the infant heir-at-law of the mortgagor, the Court refused to act on the 15 & 16 Vict. c. 86, s. 42, r. 9, dispensing with the parties beneficially interested in the equity of redemption of the mortgaged premises, where the devisees in trust under the will of the mortgagor had disclaimed, and there were not before the Court any adult parties who could be in possession of funds to redeem the estate.

A CLAIM for foreclosure. By a mortgage deed, dated the 27th of September, 1806, certain hereditaments at *Walcot*, in the county of *Somerset*, were conveyed to *Flower* and *Adams*, their heirs and assigns, to secure 400*l.* advanced by *Flower*, and 360*l.* by *Adams*, to *Ward*, with interest thereon. By a deed of the

By a deed of the

28th of December, 1815, the mortgage was transferred by *Ward* and *Flower* to *Adams* alone, in consideration of "a further advance by him of 665*l.*, out of which *Flower* was paid off. *Adams* died in 1819, having given the residue of his personal estate to his son *J. P. Adams*, and appointed him his executor, and appointing *Bush* and another his executors during the minority of his son, but without devising the estate he held in mortgage, and leaving *J. P. Adams* his heir-at-law. *Bush* proved the will of *Adams*, and out of his personal estate lent *Ward* a further sum of 700*l.*; and *Ward* executed a deed, dated the 26th of January, 1820, further charging the mortgaged premises with this additional advance. By a deed of the 12th of January, 1822, a further charge of 160*l.* on the premises was made by *Ward* to *Bush*. *J. P. Adams* obtained probate of the will of *Adams* the father, in 1824; and in 1826 lent *Ward* a further sum of 775*l.*, and took another charge on the same estate by a deed dated the 30th of January, 1826. *Ward* died in January, 1833, having by his will and codicil devised to *Bergue*, *Gunter*, and *G. B. Ward* his son, all his lands, &c., upon trusts for sale; and, after payment of his debts, to pay the interest of his residuary estate to *Mary* his wife, for her life; and after her decease to pay certain legacies, and divide the residue into seven parts, and pay the income arising from a seventh to each of his daughters therein named, for their respective lives, and to pay their respective seventh shares to their respective children after their decease; and to pay other seventh shares to each of his sons (excepting one named *Charles*), with benefit of survivorship among his sons and daughters as therein mentioned; and the remaining seventh share he gave to the children of *Charles*. *G. B. Ward*, the son, alone proved the will. *Bergue* and *Gunter* disclaimed.

*J. P. Adams* died in 1847, having by his will, dated in 1846, appointed his wife *Caroline* sole executrix, and devised to her and her heirs all his trust and mortgage estates. *Caroline*, the widow, proved the will. She afterwards married *W. Young*.

Of the various charges on the mortgaged estate, amounting to 2760*l.*, the sum of 635*l.* belonged to *Adams*, the original co-mortgagee, and 2025*l.* was part of the personal estate of one *Daniel Green*, who died in 1798, and of whom *Adams* was the surviving executor and trustee, the trusts being for the separate

use of *Mary*, the wife of *Ward* the mortgagor, for her life; and after her decease, as to one moiety, for the children of *Mary Ward*, and as to the other moiety, for one *Frances Green*.

*G. B. Ward* the son sold the mortgaged premises, (with the exception of a messuage, the sale of which the testator had directed to be deferred until the expiration of a lease thereof); and by the application of the proceeds of the sale, the amount of the mortgage debt due to the estate of *Adams* was paid off, and the mortgage monies due to the estate of *Daniel Green* was reduced from 2025*l.* to 297*l.*, and some arrear of interest. *G. B. Ward* the son died intestate in 1850, leaving *Thomas B. Ward* his son and heir-at-law, an infant.

The claim was filed by *Caroline Young*, the executrix of *J. P. Adams*, who was the executor of *Adams*, the original mortgagee, and by *Charlotte Sergeant*, a daughter of *Ward* the mortgagor, and of *Mary* his wife, and who was the administratrix de bonis non of *Daniel Green*, and by their respective husbands, against *Thomas B. Ward*, the infant heir-at-law of *G. B. Ward*. The claim stated, that there was no personal representative of *G. B. Ward*; that the messuage unsold (the lease of which had now expired) was of a value more than sufficient to pay the remainder of the mortgage debt, and that it would be beneficial to the parties entitled to the equity of redemption that it should be sold; and the Plaintiffs claimed to be paid the 297*l.* and the arrear of interest, and the costs; or, in default, to foreclose the equity of redemption of the mortgaged premises unsold; or that the same might be sold, and that a personal representative of *G. B. Ward* the son might, if necessary, be appointed for the purposes of the suit.

Mr. *Fooks*, for the Plaintiffs, submitted, that, under the 9th Rule of the 42nd section of the stat. 15 & 16 Vict. c. 86, the Court would proceed to make the decree, notwithstanding the absence of any other of the parties beneficially interested under the will of *Ward*, the mortgagor. The Plaintiff, Mrs. *Sergeant*, was in fact entitled to a share of *Ward's* residuary estate, and in that respect her interests were the same as those of the Defendant. The Plaintiffs, moreover, asked for a sale, and not for foreclosure; and the will of the mortgagor had directed that a sale should



take place:—the Court would therefore be only pursuing the directions of the trust.

The VICE-CHANCELLOR said, the objection to making a decree of foreclosure in the absence of the persons beneficially interested in the estate, and with no other Defendant than the infant heir-at-law of the mortgagor, was that which was adverted to by Lord Justice *Turner* in the case of *Goldsmid v. Stonehewer* (9 Hare, App. p. xxxviii), that there was no one before the Court who could, by possibility, be in possession of funds applicable to the redemption of the estate. In this case, it might have been proper to have acted under the late statute, and dispensed with the parties beneficially interested, if there had been trustees of the estate of *Ward*, the mortgagor, before the Court as Defendants. It might be deserving of the consideration of the parties whether the more convenient course would not be, for the persons beneficially interested to apply, by petition, for the appointment of new trustees of the estate of *Ward*; and, having obtained that appointment, for the Plaintiffs to amend the bill by making the trustees Defendants.

Mr. *Fooks* said, that there would probably be much difficulty in obtaining the concurrence of all the parties interested under the will of *Ward* in a petition for the appointment of new trustees.

The VICE-CHANCELLOR.—If there be so much difference of opinion amongst the parties as to their interests, that they cannot agree on an application for the appointment of new trustees, that is certainly not the less a reason why the Court should abstain from making the order for foreclosure against them, not only in their absence, but in the absence of any one who can effectually represent them.

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The cause stood over, with liberty to amend, by adding parties.

LEWIS v. CLOWES—*July 28th, 1853.*

Order, that interested persons not parties to the suit should be at liberty to appear at the hearing.

THE suit was by bill. Some persons interested in the subject of the suit were not parties (see 15 & 16 Vict. c. 86, s. 42). The trustees of the property in question, by their answer, submitted to act as the Court should direct. Some of the absent persons desired to appear at the hearing, and the Plaintiff consented that they should do so.

Mr. *Amphlett* applied for an order, that certain persons, who were not Defendants in the suit, might be at liberty to appear at the hearing, and avail themselves of all such grounds of defence as had been set up by the answer of the Defendant *Clowes*.

The VICE-CHANCELLOR gave leave accordingly (a).

(a) The rule under the old practice, as to admitting persons not parties on the pleadings, to appear in the cause, is thus stated by Sir *James Wigram*, V. C., in *Dyson v. Morris* (1 Hare, 419):—

"If a person is named as a party to a bill, and has not appeared, or not even been served with a subpoena to appear, the Court will, with the Plaintiff's consent, permit such party to appear at the hearing, and become a party to the decree, by submitting to be bound by it: *Copel v. Butler* (2 S. & S. 457), *Attorney-General v. Pearson* (7 Sim. 302), *Banister v. Way* (2 Dick. 686). But where the party who appears at the hearing, and offers to be bound by the decree, is not named as a party to the bill, the Court will not, unless with the consent of all the parties to the cause, permit him to become a party to the decree: *Bozon v. Bolland* (1 Russ. & My. 69, 332); *Attorney-General v. Pearson*, ubi sup."

The meaning of this passage was, in some cases, misunderstood, by supposing that, where the Defendants were friendly to the suit, or appeared by the Plaintiff's solicitor, it was only necessary to name them on the record; and that the Defendant so named might then appear at the hearing, without putting in any answer, or even entering an appearance. It was found, however, that the cause could not be set down where there were Defendants not stated to be out of the jurisdiction, and who had

not appeared.

Where a Defendant, served with a copy of the bill, desired to be heard in the suit, the orders required him to enter a general or a special appearance (General Orders XXVI. and XXVII. of the 26th of August, 1841).

The next alteration of the practice on this point was that which introduced the form of pleading by way of claim, and enabled interested parties to be brought before the Master by summons issued upon his certificate (General Order XVIII., 22nd April, 1850; see *Eccles v. Cheyne* (9 Hare, 218), per Sir *G. J. Turner*, V. C.). Then followed the late statute, 15 & 16 Vict. c. 86, which (sect. 42, rule 8) allowed the proceedings to go on until decree, in the presence or at the suit of one or more of the parties interested, providing that those persons, whom the Judge shall determine to be necessary parties to attend the proceedings, shall be served with the decree. The General Order XLI. of the 7th of August, 1852, directs this service to be recorded. The order (if any should be drawn up) on the application in the principal case may probably form a sufficient record of the fact that the new Defendants have become parties to the suit.

For a case, under the old practice, of Defendants out of the jurisdiction when the bill was filed subsequently appearing, see *Prendergast v. Lushington* (5 Hare, 177).

## Payment into Court.

EDWARDS v. EDWARDS—*May 23rd, July 18th & 19th, 1853.*

A BILL for the appointment of a receiver of the personal estate of one *Edwards*, deceased, pendente lite (a). The Plaintiffs were some of the children of the deceased and his next of kin; the Defendant was a son, who claimed to be executor under a will which had been propounded in the Ecclesiastical Court, and was the subject of litigation there. The Defendant, by his answer, admitted that he had received, and had in his hands, a sum which he mentioned, being part of the estate of the deceased.

Mr. *Bacon* and Mr. *Shobbeare* moved for the payment of the money into Court.

The VICE-CHANCELLOR referred to the case of *Dubless v. Flint* (4 Myl. & Cr. 502).

Mr. *Shobbeare*, for the motion, cited *Bowley v. Palmer* (b), in which an order for payment into Court in a similar suit had been made,—the Defendant, who was a trustee, having insisted that he was entitled to retain a certain portion in respect of his costs and expenses; but which the Vice-Chancellor had not permitted. In *King v. King* (6 Ves. 172) an order to the like effect had been made.

A motion in the suit of the next of kin of a deceased person, whose will is the subject of litigation in the Ecclesiastical Court, for the payment into this Court of money which was in the hands of the executor of the alleged will, refused—no decision either in the Ecclesiastical Court or at law having been come to on the validity of the will, and the executor insisting upon such validity by his answer, and denying that he was insolvent.

Mr. *Rolt* opposed the motion.—The motion in *Bowley v. Palmer* did not appear to have been resisted on this point. It was assumed that the fund was to come into Court. The only question was on the amount: *Reed v. Harris* (7 Sim. 639).

The VICE-CHANCELLOR.—In the case before Vice-Chancellor *Parker*, it does not appear that the right of the Plaintiff to have the fund secured in Court was really in contest. The dispute seems to have been only as to the amount which the trustee was entitled to retain. I have looked at *Montgomery v. Clark* (2 Atk. 378), which is an interesting case, from the circumstance that Lord *Hardwicke* states his opinion of the absurdity of per-

(a) See *Anderson v. Guichard*, 9 Hare, 275.

(b) 15 April, 1852, before Vice-Chancellor *Parker*. Not reported.

mitting a will, devising both real and personal estate, after it had been set aside at law for the insanity of the testator, being still litigated upon paper depositions only in the Ecclesiastical Court, and expresses his desire that the inconvenience and absurdity should be taken into consideration and a proper remedy found by the assistance of the legislature(a). In that case there had been a verdict at law against the will. In *King v. King* (6 Ves. 172) the application seems to have been made against a party who had possessed himself of funds belonging to the testator's estate, and claimed under an alleged will, to which the Ecclesiastical Court had refused probate. In *Reed v. Harris* (7 Sim. 639) the application was refused; and, although it is said that this case is distinguished from *Reed v. Harris*, by the circumstance, that there is here an allegation of the insolvency of the Defendant, yet that fact is controverted on the part of the Defendant. I cannot, I think, upon the present motion order this money to be paid into Court; but, as the motion was not made without a reasonable foundation, I shall order the costs of the motion to be costs in the cause.

(a) 2 Atk. 379.

### Payment out of Court.

In the Matter of JAMES COURTOIS' TRUST—July 26th, 1853.

Petitions for the payment out of Court of money which has been paid in under the Trustee Relief Act, must set out enough of the affidavit on which the payment was made, to shew the difficulty which occasioned the payment into Court, and who are the parties that claim, or are interested in

ON the hearing of this petition, Mr. *Selwyn* mentioned the report of *Flack's Trust* (App. p. xxx), and said, that the Court could not have intended that all the statements which a trustee might think proper to make in his affidavit, explaining possibly what had been done with the fund,—why a certain sum had been deducted for costs, or other particulars perfectly immaterial to the rights of the claimants of the fund should be set out in the petition.

Mr. *Faber*, for the petition, observed that, if the affidavit be clearly and succinctly drawn, the interests of the claimants would rarely be better shewn than by setting it out on the petition.

the fund, but not necessarily all the details contained in that affidavit.

The VICE-CHANCELLOR said, that he had followed the rule adopted by the Vice-Chancellor *Kindersley*, who had considered that the affidavit should appear on the petition. It was not, however, intended that petitions must necessarily state every particular, or set out every detail into which trustees might have entered in their affidavit. It was no doubt true, that, if the affidavit on payment of the money into Court were well drawn, it would state the case in its best and shortest form. The petition, however, would be sufficient, if it stated that part of the affidavit of the trustee, which shewed the difficulty that had induced him to pay the fund into Court, and so much of the statement which the trustee had made as was necessary to shew who were parties claiming or interested in the fund, in order that the Court might be satisfied that all persons interested were before the Court.

### Personal Representative.

APPOINTMENT of the widow to represent the estate of her deceased husband, who had been entitled to a life interest in certain tithes, the subject of the suit, and had died intestate, where no letters of administration of such estate had been obtained. *The Dean and Chapter of Ely v. Edwards*, (17 Jur. 219—M. R.).

### Petition.

PETITIONS for the appointment of new trustees of charity estates must be intitled in the matter of Sir *Samuel Romilly's Act*, and the fiat of the Attorney-General previously obtained: *In the Matter of the Bierton Charity Land*, (App. p. xxxviii).

The rule which requires petitions for the appointment of new trustees of charities to be intitled in the matter of Sir *Samuel Romilly's Act*, applies to the case of a petition for the appointment of trustees of a Wesleyan Chapel: *In the Matter of the Farteg Iron Works Wesleyan Chapel*, (App. p. xxxvii).

Petitions for the payment out of Court of money which has been paid in under the Trustee Relief Act must set out enough of the affidavit on which the payment was made, to shew the difficulty which occasioned the payment into Court, and who are the parties that claim or are interested in the fund; but it is not necessary to state all the details contained in that affidavit: *In the Matter of James Courtois' Trust*, (App. p. lxiv).

## EDWARDS v. HALL—April 23rd &amp; 28th, 1853.

Legatees applying by petition for payment of their legacies in an administration suit, before or at the time the cause is heard for further directions, ordered to pay the costs of all parties of such petition.

THE testatrix had given legacies of stock and money to The London Society for Promoting Christianity amongst the Jews, The Trinitarian Bible Society, and two other charitable societies, directing such legacies to be transferred and paid within three months after her decease. The treasurers of the several charities presented their petition, stating the death of the testatrix in February, 1851,—the decree in June, 1851,—the report of the Master, dated in February, 1853, finding the state of the assets, and the confirmation of the report; and praying that their respective legacies of money and stock might be transferred and paid to them respectively.

Mr. *Chandler* for the petition.

Mr. *Rolt* and Mr. *Bevir*, for the Plaintiffs, opposed the petition, on the ground that the cause was on the point of being heard for further directions. The petition stood over, to come on with the cause.

At the hearing for further directions, the order was made for distribution of the fund. Several of the parties to the cause appeared on the petition and asked for their costs.

The VICE-CHANCELLOR said, that separate applications by legatees for the payment of their legacies would lead to great and unnecessary expense, and the Court would not encourage such a practice; and he ordered the petitioners to pay the costs of all parties of their petition.

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### Proceedings before the Judge in Chambers.

INQUIRIES directed by the decree, transferred to Chambers upon the Master making a separate report as to part of the matters referred to him, where questions of law were involved in the reference: *Prichard v. Norris*, (App. p. lii).

The 45th section of the statute 15 & 16 Vict. c. 86, gives to the Master of the Rolls and Vice-Chancellors jurisdiction by summons, without bill or claim, to make an order for the administration of personal estate appointed by the will of a married woman, against executors, under a probate limited to the property over

which the testatrix had a power of appointment, as well as for the administration of the general personal estate of a deceased person: *Ashley v. Sewell*, (17 Jur. 269—L. JJ.).

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THORNHILL v. COPLESTON—*June 13th*, 1853.

MR. KENT moved for the appointment of guardians to an infant, to concur in a special case. This was one of the applications, which, it had been stated, should be made at Chambers; but he was instructed that the practice in this respect had been altered.

Application for the appointment of a guardian to concur in a special case (see 9 Hare, App. p. xlviii.) made in Court, and not by summons at Chambers.

The VICE-CHANCELLOR said, he believed those applications were now generally mentioned in Court; and, upon the proper evidence of the fitness of the parties proposed to be appointed, he made the order.

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**Pro Confesso.**

HENDERSON v. THOMAS—*May 5th*, 1853.

A CREDITOR'S claim. The Defendant was the executrix and devisee of the debtor, and was out of the jurisdiction, and had not appeared. The Plaintiff proceeded under the stat. 1 Will. 4, c. 36, s. 4, and, having satisfied the Court that there was reason to believe that the Defendant had gone out of the realm to avoid being served with the process of the Court, obtained an order, appointing a day to be named for the appearance of the Defendant, and published the order according to the provisions of that Act. The Defendant did not appear.

The Court will not order a claim to be taken pro confesso against an absconding Defendant, although the course of proceeding prescribed by the stat. 1 Will. 4, c. 36, s. 4, for taking bills pro confesso against such Defendants has been duly followed.

Mr. *Prior* now applied for an order to take the claim pro confesso, under the same section (s. 4) of the stat. 1 Will. 4, c. 36. The words of the Act were very general: "If, in *any suit* which hath been or hereafter shall be commenced in any Court of equity, any Defendant against whom *any subpoena or other process* shall issue." The Order XIV. of the 22nd of April, 1850, relating to claims, provided, that "every order to be so made is to have the effect of, and may be enforced as, a decree or decretal order made in a suit commenced by bill and duly prosecuted to a hearing,

according to the present course of the Court;" and the preceding Order (XIII.) enables the Court to give relief on "an affidavit of the writ of summons having been duly served."

The VICE-CHANCELLOR, after having mentioned the case to the Lord Justice *Turner*, said, that he was informed by his Lordship, that a like question had been before him in this Court (a), and he had come to the conclusion, that the Court could not, either under the Act or the Order, direct the claim to be taken pro confesso.

The order was therefore refused.

(a) *Marshall v. Hutchinson*, 22nd April, 2nd July, 1852. A claim by a married woman. The husband, who was a Defendant, was alleged to be out of the jurisdiction, and was not served. Mr. *W. W. Cooper*, for the Plaintiff, cited the General Order VIII. of the 22nd of April, 1850, submitting, that the persons against whom the relief was sought, trustees of the separate estate of the wife, being before the Court, the

decree might be made. He mentioned also *Darwent v. Walton* (2 Atk. 510), and suggested that the case was analogous to those in which the bill was taken pro confesso. The Vice-Chancellor (Sir *G. J. Turner*) said, the case was not within the 8th Order, in which it was contemplated that the other parties would be summoned before the Master; and that he could not treat the case as one to be taken pro confesso.

## Production of Documents.

A RELATION of the plaintiff, not being the solicitor, or professionally engaged in the cause, was not permitted to inspect documents produced by the Defendant under the common order, giving the Plaintiff, his solicitors, and agents liberty to inspect them. *Summerfield v. Prichard*, (17 Jur. 361—M. R.).

On the sufficiency of the admission upon which the order for production of documents should be made. *Wing v. Harvey*, (17 Jur. 481—V. C. Stuart).

ATTORNEY-GENERAL v. CLAPHAM—June 30th, 1853.

AN information for settling the trusts of a Wesleyan Chapel.

Mr. *Craig* and Mr. *Cairns*, for certain Defendants, moved, that the time for closing the evidence in this case might be extended until four weeks after the relators and the Defendants,

The 20th section of the stat. 15 & 16 Vict. c. 86, does not extend to enable a Defendant to obtain an order for the production of documents in the possession of a co-Defendant; in such a case, a cross-bill may still be necessary.

production of documents in the possession of a co-Defendant; in such a case, a cross-bill may still



*Scott* and another, should have left in the usual manner with the Clerk of Records and Writs the original journals of the Conference, from its formation until the present time; or that the Court would make such order as it should think fit for procuring for the said Defendants the production and inspection of such journals.—They contended, that the information was substantially the suit of the Defendants, who represented the Conference, and that the relators must be regarded as in the nature of Plaintiffs, against whom the stat. 15 & 16 Vict. c. 86, s. 20, enabled the Defendants to apply for production of documents. That the present case was within the spirit, if not within the terms of that Act; or, if not, the Court, under its former and general jurisdiction, would give the Defendants that which they sought: *Princess of Wales v. Earl of Liverpool* (1 Swanst. 121).

The VICE-CHANCELLOR (without hearing Mr. *W. M. James* and Mr. *Little* in opposition to the motion):—

The application is one of the most singular I have ever known. The Defendants apply to the Court to stay the suit of the *Attorney-General*, unless the relators, or certain of the Defendants, shall produce the documents mentioned in the notice of motion. The relators are on the record as security for the costs of the information. It is wholly without precedent to call upon them for the production of documents. With regard to Defendants, they might have a common interest with the Plaintiffs in a bill; and if they were in possession of material documents, the other Defendants requiring discovery from them might, under the old practice, have filed a cross bill against the Plaintiffs and those Defendants, and might have obtained the production of documents in that suit. Then, in order to obviate the necessity, on the part of a Defendant, to file a cross bill against the Plaintiff merely for the purpose of discovery, the Act was passed, enabling a Defendant to file interrogatories for the examination of the Plaintiff, and apply for an order that he should produce documents in his possession. The Act does not, however, provide for any application by one Defendant against his co-Defendant for discovery or production of documents. It was thought to be proper that such a case should be still left to the operation of the ordinary course of proceeding by a cross bill. With regard to the case of an information also, it has not been thought ne-

cessary to make any provision. It would have been improper, attending to the position of the *Attorney-General*, that there should be any rule requiring him to produce documents in his possession or power. The legislature has reposed confidence in the discretion of the *Attorney-General*, in the institution and control of suits of this description; and it is always open to the Defendants to apply to the *Attorney-General*, if relators or others should, by misleading him or otherwise, attempt to make an improper or oppressive use of the power vested in the *Attorney-General*. A Defendant, who is aggrieved by the proceedings in an information, or who has reason to complain that documents are unjustly withheld from him, may apply to the *Attorney-General*; and if he found that there would be injustice in going on, while the parties actively proceeding with the suit had in their possession (as it is here alleged) a vast amount of information, the knowledge of which would be beneficial to the Defendants, and promote a right determination of the question in dispute, the *Attorney-General*, having come to that conclusion, would, I do not doubt, take care to give such directions as would be best calculated to further the ends of justice, and give the Defendants every protection to which they are entitled. There was not, before the late Act, any jurisdiction in this Court to make such an order as is now asked; and that Act has introduced no alteration in the practice favourable to any such application. The motion must therefore be refused, with costs.

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### Purchase Deed.

FORM of order for the investment in lands of purchase-money paid for the lands of incapacitated persons, &c., sold to Railway Companies or otherwise, and paid into Court under the Lands Clauses Consolidation Act, &c. *Approval of Purchases and Titles*, (App. p. xxxvi).

## Receiver.

SMITH v. SMITH—*June 13th, 1853.*

A MOTION for a receiver of the real and personal estate of a testator, on the application of the Plaintiff, who was a devisee and legatee under the will, on the ground that the devisee in trust and the executors were resident in *Jersey*, and therefore out of the jurisdiction of the Court. All the real estate, and a part of the personal estate, were in *England*. The rest of the personal estate consisted of some personal chattels in *Jersey*, and some monies invested in the *French Funds*.

A receiver appointed of real and personal estate where the devisee in trust and personal representatives were in *Jersey*, and therefore out of the jurisdiction.

The service of the copy of the bill and of the notice of motion was proved.

Mr. *Rolt* and Mr. *Prendergast* for the Plaintiff.

The Defendants did not appear. A copy of a newspaper, published in *Jersey*, was produced, in which copies of the statements of the bill and affidavits were given, and the proceeding by service in *Jersey* was complained of, as a violation of the charters and privileges of the island and its local judicature.

Mr. *Rolt* asked that the receiver of the personal estate should be appointed, without any exception as to the funds and chattels out of the jurisdiction. The receiver would recover possession of those parts of the personal estate according to the laws of the country in which they might happen to be found.

The VICE-CHANCELLOR made the order accordingly.

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## Revivor and Supplement.

AFTER substituted service of an order to revive, obtained under the 52nd sect. of the stat. 15 & 16 Vict. c. 86, and made upon the solicitor of the Defendant under an order of the Court for that purpose, the Defendant being out of the jurisdiction, the Court, on the application of the Plaintiff, ordered an appearance to be entered for the same Defendant who had not appeared: *Foster v. Menzies*, (17 Jur. 657—M. R.).

Whether, after a reference made at the hearing of the cause, to ascertain whether all proper parties were before the Court, and it became necessary to make the representative of a Defendant, who subsequently died, a party, the case was within either the 52nd or the 53rd section of the statute—*Quære*: see *Heath v. Chapman*, 6 May, 1853, (17 Jur. 570—V. C. *Kindersley*).

Revivor of a suit before decree may be by order under the 52nd sect. of the stat. 15 & 16 Vict. c. 86; but the introduction of supplemental matter before decree is (generally) by proceeding under the 53rd sect. (See 44th General Order, 7 Aug. 1852).

THERE is an inaccuracy in the note, *supra*, p. xxxi, which states, that, where an abatement in a suit takes place before any decree has been made in the cause, the suit cannot be revived by order under the 52nd section of the stat. 15 & 16 Vict. c. 86, and that a bill of revivor is necessary. The rule is, that a supplemental order cannot, under the 52nd section, be obtained before decree. A suit may be *revived* before decree by an order made under that clause; but the 53rd section is adapted to the general class of cases in which *supplemental* matter is to be introduced on the record before decree.

LEE v. LEE, LYS v. LEE—*March 23rd, 1853.*

A Defendant, after a decree, may file a supplemental bill to add parties, or otherwise duly prosecute the decree.

IN this case a Defendant, to whom the conduct of the cause had been committed, desired to bring other incumbancers before the Court, and for that purpose applied for leave to annex to the bill a statement by way of supplement; but which the Court refused. (See *Lee v. Lee*, 9 Hare, App. p. xci.) The Defendant then filed a supplemental bill for the same purpose.

Mr. *Murray*, for the Plaintiffs, moved that the supplemental bill should be taken off the file for irregularity. The Plaintiff only was entitled to file a supplemental bill, although a Defendant might file a bill of revivor.—He cited *Phillips v. Clark* (7 Sim. 231). See *Ward v. Swift* (6 Hare, 309).

Mr. *Speed*, for the Defendant, opposed the motion.—After the decree all parties are actors, and any party may proceed with the suit: *Dixon v. Wyatt* (4 Madd. 392), *Devaynes v. Morris* (1 Myl & Cr. 213), *Cattell v. Corral* (1 Hare, 216).

Mr. *Murray*, in reply, distinguished the case of *Devaynes v. Morris* from the present case, by the fact, that, in *Devaynes v. Morris*, there was no Plaintiff surviving to prosecute the suit. *Dixon v. Wyatt* was no authority for a Defendant filing a supplemental bill without leave.

The VICE-CHANCELLOR held, that the Defendant was entitled

to proceed with the suit by supplemental bill. In *Devaynes v. Morris*, Lord *Cottenham* had clearly contemplated the case of a suit becoming defective as well as the case of a mere abatement, and had expressly laid it down "that a Defendant, who is a party to accounts directed by the decree, is at liberty, upon the suit becoming defective, to file a bill for the purpose of restoring the suit to that state which is necessary in order to the due prosecution of the decree: (Id. 225).

Motion refused, with costs.

WARD v. CARTWRIGHT—*June 27th, July 27th, 1853.*

AN order to revive had been obtained by the Plaintiffs in a suit, which abated after decree, and the order was served upon the Defendants, under the stat. 15 & 16 Vict. c. 86, s. 52. One of the Defendants had not entered an appearance in the revived suit.

Mr. *Batten* moved that the Plaintiffs might be at liberty to enter an appearance for the Defendants. The Act provided, that, upon service of the order upon the Defendant, "he shall thenceforth become a party to the suit, and shall be bound to enter an appearance thereto in the office of the Clerk of Records and Writs, within such time and in like manner as if he had been duly served with process to appear to a bill of revivor filed against him." (Sect. 52.) The present application was made by analogy to the practice under the 29th General Order of May, 1845.

Upon service on the Defendant of an order to revive, obtained by the Plaintiffs under the 52nd section of the Act of 15 & 16 Vict. c. 86, after decree, the suit may proceed without an appearance by such Defendant.

The VICE-CHANCELLOR said, that he had conferred with some of the Judges on the point, and that they agreed with him in thinking that an appearance was not necessary in such a case; and that, upon service of the order, without any appearance on the part of the Defendants, the suit might proceed.

## Sale.

DIRECTIONS for sale of an infant's estate in a foreclosure suit (under circumstances shewing it to be clearly for the benefit of the infant), without giving time to redeem: *Mears v. Best*, (App. p. li).

PIMM v. INBALL—*June 3rd, 1853.*

Evidence of the propriety of a sale of an estate by private contract heard and approved of in Court, and not referred to Chambers.

A PETITION for the sale of an estate by private contract, after an ineffectual offer for sale by auction.

Mr. *De Gez*, for the petition, suggested an inquiry whether the proposed contract was a proper one to be made.

The VICE-CHANCELLOR said, that the inquiry in Chambers was unnecessary, if there was evidence of the propriety of the proposed contract. And upon a sufficient affidavit of the value of the estate, as corresponding with the price offered by the proposed purchaser, the Court approved of the contract, and adjourned the petition for the usual inquiries as to the title, that the conveyance might be settled, and the application disposed of by one order.

## Scheme.

In the Matter of WYERSDALE SCHOOL—*June 3rd, 1853.*

A scheme for the administration of a charity ordered to stand over for consideration of the Attorney-General in the first instance.

A PETITION for a scheme.

Mr. *W. M. James* suggested that the course which had been taken by the Master of the Rolls and the Vice-Chancellor *Stuart* in other cases, would be conveniently pursued in this case—namely, that the scheme should be laid before the Attorney-General, and, if not objected to, should be then brought before the Court for approval; and if there should be any points on which objections to the scheme arose, the points in dispute might be argued in Court.

The VICE-CHANCELLOR approved of this course; and the petition stood over accordingly.

## Service.

NOTICE of motion for a decree under the 15th section of the statute 15 & 16 Vict. c. 86, may be served on a Defendant out of the jurisdiction: *Meek v. Ward*, (App. p. lv).

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## Short Cause.

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## Stamp.

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## Taxation.

In the Matter of HARVEY'S SETTLEMENT—*June 25th, 27th, 1853.*

MR. PRENDERGAST applied to the Court for an order for transferring funds to new trustees, without the previous taxation and payment of the costs of the proceeding, but with liberty to the new trustees to pay the costs, when taxed; on the suggestion that he was instructed that it would be impossible to procure an appointment for the taxation of costs before the long vacation.

Practice of the Taxing Master's office as to the taxation of costs not requiring service, or where service is dispensed with.

The VICE-CHANCELLOR said, that he had made inquiries with reference to the statement as to the delay in the taxation of costs, and he was told that there was not any delay in taxing costs in short and unopposed matters. The Taxing Masters were all in the habit of setting apart a portion of every week for the taxation of costs in matters where service was not required or had been dispensed with by consent, some of the Masters fixing a particular day in each week, and others a portion of each day, for this purpose; and he was informed that there was not any instance of a money order having been delayed, merely from the difficulty of obtaining an appointment for the taxation of the bill of costs.

**Witness.**

PILLAN v. THOMPSON—*July 27th, 1853.*

The Examiner of the Court, or a special Examiner, will be appointed to take the examination of a sick witness as occasion may require.

MR. EVANS applied for an order, that one of the Examiners of the Court should attend to take the examination of a witness in infirm health at the house of the witness. The Examiners had been communicated with, and one of them could conveniently attend on a day which had been fixed. The state of the witness's health or the engagements of the Examiner might, however, render it necessary that another day should be appointed; and it was asked, that the Court would permit short notice of any further appointment to be given.

The VICE-CHANCELLOR made the order for attendance of the Examiner, and said, that the party had better make another application if the suggested difficulty should arise. His Honour said, that, in a case where the Examiner of the Court could not attend, the Court had appointed a special Examiner.



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commenced in the life of the lessee, and was continued after her decease as to the amount of the fines: the dispute was ultimately compromised by the payment of a sum by the devisee of the leasehold estate, in respect of each renewal and of certain costs:—*Held*, that the fine payable in respect of the admission of the trustees, which became necessary in the life of the testatrix, to fill up the number, and the costs of the litigation in respect of such fine, were payable out of the general personal estate of the testatrix, exclusive of the leaseholds; and that the fine which became payable for filling up the number of trustees when it became necessary to do so, after the death of the testatrix, were payable by the devisees of the particular leasehold estate, and not by the general personal estate. *Fitzwilliams v. Kelly*, 266

2. An estate was devised to the eldest son of the testator, in fee, charged with four portions of 5000*l.* each for younger children. The eldest son, on his marriage, settled the estate to the use of his intended wife after his decease, for her life, if she should survive him, with remainder to himself in fee, and covenanted within six months to pay off the four sums of 5000*l.* and release the estate therefrom. He paid off one sum of 5000*l.*, and died intestate.—*Held*, that the husband was not a purchaser under the settlement, and that the covenant in the settlement could not be taken to have been for indemnity only; but that, so far as the wife and younger children were concerned, the husband had adopted the portions as his own debt, and that he had also made them his debt as between his real and personal representatives. *Barham v. The Earl of Clarendon*, 126

3. When a man covenants upon

his marriage to lay out money in the purchase of land, and to settle the land when purchased in favour of his wife and children, with remainder to himself in fee, the money is converted into land, not only in favour of the wife and children, but in favour of the heir also; and the heir may enforce the covenant where any of the uses of the settlement subsist at the death of the covenantor.

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2. Sums invested by the testatrix in stock, and other sums placed by her in the savings bank, were the produce of monies which had been partly collected and partly appropriated by the testatrix for the purpose of building and endowing a church in a certain parish. The stock had been invested in the names of the testatrix and of another person. At the time of the decease of the testatrix no deed appointing or declaring the trusts of the money had been executed, and no site for the intended church had been obtained:—*Held*, that the money and stock were, at the death of the testatrix, part of her personal estate; and that the liability either of the money or the stock to any charitable use was excluded by the stat. 9

Geo. 2, c. 36. *Girdlestone v. Creed*, 480

3. Exception to stat. 9 Geo. 2, c. 36, in the case of a bequest of monies to the extent of 500*l.* for building or endowing a church. *Ib.*

4. Declaration of the trusts of the meeting houses for religious worship by the people called Methodists, and of the power of appointing preachers in such houses under the trusts thereof, in conformity with the rules and regulations of the society. *Att.-Gen. v. Clapham*, 540

5. Where it appeared that the paramount object of a charitable foundation for the purposes of religious worship in a particular locality was, that it should form a branch of a certain association; and that association, subsequently, in the course of its legitimate development, became subjected to an especial form of government and discipline; and deeds had been executed by the trustees of the charity estate, soon after the time of the endowment, declaring trusts of the property, which were defective in their provisions, and also gave or reserved powers to the local trustees inconsistent with the general government and discipline of the associated body, the Court, in a suit brought a century after the date of the declaration of trust, rectified the deed, so that the estate might be held and administered in conformity with the paramount intention that the local foundation should remain connected with and form a part of the general body. *Ib.*

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1. The release and assignment by a married woman of her life interest in her separate estate, although fettered by a restriction against anticipation, was *held* to form a consideration for a settlement by another person; for, though the married woman could not pass her future interest, she might and did thereby release her past income: and the question of consideration moreover depended, not upon the point whether her assignment passed her interest, but upon the question whether her concurrence enabled the settlement to be made. *Harman v. Richards*, 81

2. Parties to a series of deeds considered as stipulating according to the rights which they had. *S. C.*, 88

3. Consideration for a settlement being found to exist, it was *held* to extend to the whole and not to a part only of the property which was the subject of it. *Ib.*

4. A deed, though made for valuable consideration, may be affected by mala fides—*S. C.*, 89

5. The statement in a deed of settlement, executed after marriage, was, that it was made in consideration of 5*s.*, and divers other good

## CONSTRUCTION. 709

and valuable considerations:—*Held*, that this statement did not, as against strangers to the settlement, amount to evidence that it was not voluntary; and a defendant claiming against it as a purchaser for valuable consideration, and insisting at the bar that the settlement was fraudulent and void under the stat. 27 Eliz. c. 4, the Court directed an inquiry whether the settlement was founded on any and what valuable consideration. *Kelson v. Kelson*, 385

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See DEVISE.

1. Fallacy of applying to a case of intestacy words which the testator has applied to the case of testacy. *Robinson v. Governors of the London Hospital*, 28

2. An agreement by a creditor not to take proceedings against the debtor during his life, nor against the debtor's estate during the life of his wife, if she should survive him, construed (as to the latter clause) to mean that any beneficial interest which the wife might take in the property of the husband should not be disturbed during her life, and not to be an agreement that the creditor should be debarred from suing the personal representative of the husband; and therefore the creditor obtained a decree for an account against the wife as the personal representative of the husband, with a declaration that the interest of the wife was not to be disturbed during her life. *Harman v. Richards*, 81

3. Construction of a will as supposing the testator to contemplate the period of his death with reference to the objects who are to take under his will, and to look beyond

that period with reference to the event on which his dispositions are to take effect. *In re Rye's Settlement*, 112

4. By a will property was given to trustees, to apply the rents, interest, and proceeds for the maintenance of the testator's son *Edward* for his life, and not to be paid to any person under an assignment by or execution against the son; and after the decease of the son, for the two daughters of the testator absolutely. By a codicil, it was declared, that, in case of assignment by *Edward*, the trustees should stand possessed of the property upon trust for the daughters of the testator, in the same manner and form as declared by his will in the event of the death of *Edward*. By another codicil, the testator gave 600*l.* stock to *Edward*, in addition to what he had left him by his will, subject to the same controlling powers and restrictions as were appointed by the will; and he gave a like sum to his son *William*, subject to the like control, "and to the survivor of them, and in the event of both their deaths" for the benefit of the said daughters:—*Held*, that the true construction of the second codicil was, that, in the event of the death of either of the legatees, both the legacies of stock should go to the survivor, and not that on the death of either his legacy should go to the survivor, which would cut down an absolute gift into a life interest. That, although in one codicil the words "in the event of the death of *Edward*" meant upon the death of *Edward*, it did not follow that the words in another codicil "in the event of both their deaths" meant upon both their deaths; for one expression was applied to a life interest and the other to a capital sum: That the period of survivorship must be referred to the period of distribu-

tion, namely the death of the testator: That, therefore, *Edward*, having survived the testator, took the legacy of stock absolutely. *In the Matter of Mores' Trust*, 171

5. The rule, that added legacies are subject to the same conditions as the legacies to which they are added, is not applicable to the case, inasmuch as the application of the rule would alter the terms of the additional gift. And whether the rule applies to any cases except where the original legacy is absolute or defeasible in the party to whom the additional legacy is given—*quere*. *Ib.*

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1. Devise and bequest of freehold, copyhold, and leasehold estate, upon trust for sale, with a direction that the proceeds, after payment of all costs, charges, and expenses attending the same, shall be considered, to all intents and purposes, as part of the testator's personal estate; and a gift of the residue of his money, *London Assurance stock*, securities for money, &c. to the *London Hospital*, for the purposes of the charity:—*Held*, that the real and personal estate were thrown into one mass; and that the charge of debts, legacies, and costs were to be apportioned between the real and personal estate pro rata. *Robinson v. The Governors of the London Hospital*, 19

2. A direction that the proceeds of the real and leasehold estate should be considered as part of the personal estate, does not take away the right of the heir; nor does the addition to that direction, that the real estate shall be taken to be personal estate "to all intents and purposes," take away that right. *Ib.*

3. After the testator, who was a shopkeeper, had made a will, bequeathing his leasehold house and shop and the stock in trade therein to his wife (subject to certain trusts, which failed), and giving his residuary estate in another manner, he became insane. No commission of lunacy was taken out, but his wife, not being disposed of or competent to carry on the trade, joined with the persons whom he had named executors, and also with the residuary legatees, in an agreement for the sale of the leasehold premises and stock in trade therein for a gross sum, to be paid by instalments. After this agreement was made, and possession of the property delivered to the purchaser, the testator died. The Court, in an administration suit, approved of the agreement as beneficial to the estate, and directed it to be carried into effect:—*Held*, that, notwithstanding the agreement for sale, and the transfer of the possession of the property specifically bequeathed, none of the parties having any lawful authority to effect such a sale, both the leasehold estate and the stock in trade must be taken as unconverted at the death of the testator, and passed to the specific legatees. *Taylor v. Taylor*, 475

## COPYHOLD.

See MARSHALLING.

1. The separate examination of a married woman *held* to be well taken

for the purpose of aliening her copyhold estate by a deputy steward, who was a minor. *Eddleston v. Collins*, 99

2. The steward of a manor, although a minor, may execute the office, if he have sufficient discretion. *Ib.*

3. The duty of taking the examination of a married woman on the conveyance of her estate, is not a judicial duty—*Semble*. *Ib.*

## CORPORATION.

See APPENDIX, p. v.

SPECIFIC PERFORMANCE, 8.

1. Where the charter of a Corporation has been granted with certain terms or provisions, and the charter is subsisting and unimpeached, notwithstanding it might be open to the Attorney-General or the Crown to take proceedings for setting it aside, the Court will still deal with the Corporation as having all the rights and powers of an existing body. *Robinson v. Governors of the London Hospital*, 24

2. Construction of the charter of the *London Hospital*, distinguishing the powers of donors to give and the powers of the Hospital to take. *Ib.*

## COSTS.

See APPENDIX, pp. iii., x., xi., xliii., xliv.

A vendor, after the contract, and before the conveyance to the purchaser, died, without having devised the legal estate in the premises in trust to complete the purchase; and a suit for a specific performance of the contract against the trustees and the infant devisees of interests in his estate having become necessary,

the Court made the decree without costs, there having been no default on either side. *Hinder v. Streeten*,

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## COVENANT.

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VENDOR AND PURCHASER, 1, 2.

## CROSS BILL.

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## CUSTOM.

1. A decree by some against the others of the deputy day oyster meters, having the exclusive right of shovelling, unloading, and delivering oysters within the port of *London*, for an account and equal apportionment amongst the meters of the scorage dues received by them,—such decree being founded on the immemorial existence of the body of meters, which was held to be proved, notwithstanding the meters were originally labourers, and that they habitually described themselves as servants of the Corporation of *London*. *Thompson v. Daniel*, 296

2. Proof that there had been an equal division of the scorage dues received by the deputy day oyster meters for the last sixty years,—a former decree in a suit in which the common right of the meters was in question,—and earlier evidence that the meters were employed by turns, *held* to be sufficient to shew that they were entitled to an equal division among themselves of the scorage dues which they received. *Ib.*

3. It being proved, that, for at least sixty years past, the affairs of the deputy day oyster meters had been regulated by themselves, and there being no evidence of any in-

## DEBTOR AND CREDITOR.

terference with the body either by the yeomen of the waterside or the Corporation, it was *held* that the deputy day oyster meters had the right of making bye-laws and regulations binding on their body, as to the manner in which their duties should be performed. *Ib.*

4. *Held*, also, that however it might be competent to the Corporation of *London*, in such corporate character, or as representing the yeomen of the waterside, to alter the rights and duties of the office of the deputy day oyster meters; yet it was not competent to the Corporation, in exercising the mere power of appointing meters, to appoint one who should hold his office upon terms inconsistent with those which were prescribed by the regulations of the body of meters. *Ib.*

5. That the Court would not charge the Defendants with default in declining to receive an additional payment per peck for the services of the holdsmen, which many buyers would voluntarily pay, but to which the meters were not lawfully entitled; and would, on the other hand, allow the Defendants such reasonable payments as they had made for the labour of the holdsmen, by whom the duty of shovelling, unloading, and delivering the oysters was performed. *Ib.*

## DEBTOR AND CREDITOR.

*See* PRINCIPAL AND AGENT.

PRINCIPAL AND SURETY.

1. A debtor executed a deed, expressed to be for the better management of his affairs and for the liquidation of his debts and engagements, and he thereby conveyed and assigned his real and personal estate and effects to one of his creditors, leaving it to the discretion of the creditor in what order and in favour



of what creditors the proceeds should be applied, and giving him powers of management and sale, and to negotiate and enter into arrangements and apply the proceeds of the estate and property in carrying them into effect, such powers to terminate with his life or upon his resignation; and the debtor then went abroad, that the arrangement of his affairs might be facilitated by his absence. The Court, upon such circumstances, *held*, that the deed was not framed to secure any debt due to the creditor to whom the conveyance and assignment was made; and that the deed (independently of the grantee being a creditor, and of any communication with other creditors,) was a mere deed of management; that it was competent to the debtor to revoke it; and that it was fraudulent and void against other creditors. *Smith v. Hurst*, 30

2. A creditor cannot vest his property in one of his creditors for the purpose of protecting himself against his other creditors. A deed executed for such a purpose is fraudulent and void against the latter, and the creditor taking such a conveyance is a party to the fraud, and cannot be in a better position than the debtor. *Id.*

3. In the case of a deed vesting property in trustees upon trust for the benefit of particular persons, the deed cannot be revoked, altered, or modified by the party who has created the trust; but, in cases of deeds purporting to be executed for the benefit of creditors, the question, whether the trusts can be revoked, altered, or modified, depends on the circumstances of the case; and therefore, when it appeared that communications had taken place with creditors of the grantor not parties to the deed, the Court, in treating the deed as against the parties to it as

fraudulent, directed inquiries as to the interests of the creditors not parties. *Id.*

4. A deed which a debtor has power to revoke, and which he attempts to use as a shield against his creditors, cannot be otherwise than fraudulent and void against them. *Id.*

5. The Court only interferes in aid of the legal right when the party has proceeded at law to the extent necessary to give him a complete title; and therefore, where the Plaintiff had obtained judgment, but had not sued out an *elegit*, it was *held*, that he was not entitled to the aid of the Court as against the freehold estate of the debtor; that he did not under the statute 1 & 2 Vict. c. 110, s. 13, become entitled to such aid until the expiration of one year from the time of entering up his judgment; and that this, being an objection that the Plaintiff's title was incomplete, was therefore not removed by a resort to the jurisdiction of the Court to relieve against fraud in respect to the freehold estate. *Id.*

6. The Court will interpose to remove legal impediments out of the way of judgment creditors, or for the preservation of the property pending disputes at law as to the rights of judgment creditors; but the Court does not supply or extend legal rights. *Id.*

7. A debtor conveyed his life interest in certain property in trust for creditors, parties to the deed; and the creditors, in consideration thereof, granted to the debtor license to reside and attend to his affairs in any place he might think proper, without suit or molestation, in his person or his goods, chattels, and effects, by any such creditors; and that, in case of any suit or molestation by any of such creditors, contrary to the true

intent and meaning of such license, the debtor should be wholly released and acquitted of the debt, and the deed might be pleaded in bar:—*Held*, that this amounted only to a license by the creditor to the debtor to live unmolested, and did not operate as a release of the debt or a discharge of the debtor's estate; and that neither a suit by creditors against the trustees and the debtor to enforce the trusts of the deed,—nor an administration suit by the creditor against the estate of the debtor after his decease, for payment of so much of the debt as the trust property was insufficient to pay, was barred by the trust deed or amounted to an acquittance of the debt. *O'Brien v. Osborne*, 92

8. *Held*, also, that the existence of the trust deed, and the covenants and license therein contained, prevented the operation of the Statute of Limitations during the life of the debtor in respect of the debts, for the payment of which the trust was created. *Ib.*

9. A creditor, at the date of a deed of inspectorship and trust, made by a debtor for the benefit of his creditors, had a claim against the debtor for an ascertained sum of 1974*l.*, and an unascertained sum on account of acceptances which he had given to the debtor on goods shipped by the debtor through the creditor as his factor, on a *del credere* commission, and which had not then been sold, of which acceptances 5000*l.* had then become due; and the creditor, in this state of things, executed the deed generally, without specifying on the deed the amount of his debt or claim. Upon the ultimate account after the goods were sold, it appeared that a balance of 5348*l.* was due to the creditor from the debtor:—*Held*, that the creditor was entitled to a dividend from the debtor's estate for the sum

of 5348*l.*, and not merely for the sum of 1974*l.* *Graham v. Ackroyd*, 192

10. A debt is not to be kept alive against one party by the admission of another, except in cases of continuing joint contract. *Fordham v. Wallis*, 228

11. The existence or non-existence of the demand depends upon the act of the person, and not upon the relative liability of the property. *Ib.*

12. The testator devised certain estates to trustees for the payment of his debts, and appointed the same trustees his executors, and devised other estates in various portions, some to the same trustees for the separate use of married women for life with remainders over, others to devisees in fee, and others to devisees for life with remainders over in tail, and of some of which estates the testator created terms for raising specific sums of money, and others he charged with legacies and annuities. The testator died in January, 1843. On a bill filed in August, 1849, by the payee of a promissory note made by the testator (on which it was proved that interest had been paid by the executors up to 1847), for payment of the note out of the real as well as the personal estate, against the executors and trustees, some of whom were insolvent, against the residuary legatees who had received payments on account of their residuary shares, and against the parties beneficially interested in the real estate, of whom some set up the Statute of Limitations in bar of the demand, some omitted to do so, and others were out of the jurisdiction. *Fordham v. Wallis*, 217

*Held*, that payment of interest is an acknowledgment of a debt; and, upon a general acknowledgment of a debt where nothing is said to prevent it, a general promise to pay is to be implied: and such an acknowledgment

made by a party filling the two characters of beneficial devisee and executor, will be attributed to both characters and not to one only, for the moral obligation does not attach more to one character than to the other. But it is otherwise where the characters held by the party are entirely distinct, as where he is personally liable as debtor, and is answerable also in the character of executor or trustee of another; for he then represents two persons, and the question in such a case is by whom the promise is made, and not what is its extent or effect. *Ib.*

13. That the payment of interest of a debt of the testator by his executors, they being also trustees of his real estate not subjected by the will to debts, did not necessarily keep the debt alive as against such real estate; for, although the executors and trustees were the same persons, they filled different characters; and where the payment was made by them in the character of executors only, the real estate was not affected by it. *Ib.*

14. That the creditor was entitled to a decree as against the parties beneficially interested in the real estate who had omitted to claim the benefit of the Statute of Limitations. *Ib.*

15. That the heir or devisees of the real estate of a testator might themselves take proceedings for securing the due application of the personal estate in the payment of the debts, and in exoneration of the real estate; and that they cannot, therefore, after a lapse of time, successfully resist the claim of a creditor, as against the real estate, on the ground of his laches in not suing earlier for the recovery of the debt. *Ib.*

16. That the demand of a simple contract creditor as against the real estate of a testator, which would otherwise be barred by the Statute of Limitations, was not kept alive so as to

preclude the operation of the statute, by the effect of any right, which might exist or might have existed among the parties, to have the assets of the testator marshalled. *Ib.*

17. That payments by executors to residuary legatees, whilst the debts of the testator remained unpaid, was a breach of trust; and that, the debts having been kept alive against the executors, the statute was no bar to the claim of the creditor, as against the residuary legatees, to the extent of their interest in the residue, and they must therefore refund the monies they had received on account of the estate. *Ib.*

18. That parties who being joint and several debtors had not availed themselves of the statute, and have been held liable to debts which the statute would have barred, cannot insist upon contribution from other joint and several debtors, who have protected themselves by setting up the statute from their liability in respect of the same debts—*semble*. But whatever the right to such contribution may be, it does not entitle the creditor to insist upon its application as against the debtors, who have so protected themselves. *S. C.*, 231

#### DECLARATORY DECREE.

*See APPENDIX*, pp. xii., xiii., xiv.

#### DECREE.

*See APPENDIX*, pp. xvi., xxvii., xlv.

#### DEED OF SETTLEMENT.

*See JOINT-STOCK COMPANY*, 1.

#### DEEDS.

*See VENDOR AND PURCHASER*, 2.

1. The question whether several

deeds are part of the same transaction, or are separate and distinct transactions, depends on the surrounding circumstances, and not simply upon the fact whether the deeds are, or are not, by express reference grafted into or connected with each other. *Harman v. Richards*, 81

2. Evidence of surrounding circumstances on which the Court held a settlement, that standing alone would have been fraudulent against creditors, to be connected with and part of the same transaction with several purchase-deeds of even date, to which some only of the same persons were parties. *Ib.*

### DEPOSITIONS.

See APPENDIX, p. xlv.

### DESCENT.

See MALE LINE, 4.

### DESCRIPTION.

1. A gift by the testator to his first cousin *Vincent B.*, the son of his late uncle *Peter B.* The testator had no cousin named *Vincent B.* who was the son of his late uncle *Peter*; but he had a first cousin named *George Vincent B.*, who frequently visited and dined with him, whom he commonly called "*Vincent*," and who was the son of a deceased uncle named *Joseph*. The son of *Peter* was named *Frederick*, and was not in the habit of visiting the testator. The Court admitted evidence of these extrinsic circumstances, and held, that the testator was mistaken in the description rather than in the name of the legatee; and that *George Vincent B.*, the son of *Joseph*, was entitled to the legacy. *Bernasconi v. Atkinson*, 345

2. Held, also, that the evidence of the solicitor who prepared the will,

that the testator had by his instructions expressly indicated that *George Vincent B.* was the person for whom the legacy was intended, and that he (the solicitor) had inserted the description without the direction of the testator, and in a mistaken belief of the parentage of the legatee, was not admissible. *Ib.*

3. Where a legatee is pointed out by name and description, and there is no person to whom the name and description both apply, but the name only applies to one and the description only applies to another, the Court will endeavour, from such of the extrinsic circumstances as are admissible, to ascertain the person meant by the testator, and will not hold the bequest void for uncertainty, except in cases where it is impossible to discover any preponderance in favour of one of the persons rather than of the other. *Ib.*

4. *A.*, who, under a deed made by his father, was entitled, upon his father's death, to a moiety of his personal estate, assigned to trustees in these words—"all the property of which he now is or may stand possessed, both real and personal, and now consisting of one note of hand for 120*l.*, one other note of hand for 40*l.*, one cottage in his own possession, sold to *S.* at his decease for 155*l.*, two other cottages in the occupations of *F.* and *W.*" upon certain trusts, for his wife and relations. *A.* afterwards died in the lifetime of his father. Upon the death of the father,—held, that the trustees under *A.*'s assignment were entitled to take under that instrument the moiety of the father's personal estate. *Choyce v. Otley*, 443

### DEVISE.

See POWER.

1. A devise to trustees of certain

copyhold estate, and all other the real estate of the testatrix, and a declaration of the trusts of the monies to arise from the sale of such copyhold estate, and a general devise of all other her real estate to three persons as tenants in common:—*Held*, not to pass the legal estate of the testatrix in certain copyholds, of which she was merely trustee. *In re Morley's Will*, 293

2. Devise of real estates upon trust to pay the rents and profits unto or to the use of *R. L.* and his assigns, for his life, from and after his decease, unto the first and other sons of *R. L.*; and, in default of such issue, in trust for the first and other daughters of *R. L.*; and in default of such issue, to pay the rents and profits as therein mentioned; and an ultimate remainder over:—*Held*, that *R. L.* did not take an estate tail in the devised premises, nor an estate for life, with remainder to his first and other sons successively in tail, nor an estate for life with remainder to his first son in fee. *Bridger v. Ramsey*, 320

3. The 28th section of the Wills Act, (7 Will. 4 & 1 Vict. c. 26), which enacts, that, "where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of," applies to the devise of an existing estate or interest, and not to an estate or interest which the testator, by his will, creates *de novo*; and therefore a gift by will since the statute, of an annuity to *A.*, without words of limitation, but which was by the same will charged upon real estate, is not a devise of a perpetual annuity or rent charge, and is a gift of an annuity for life only,

as it would have been before the statute. *Nichols v. Hawkes*, 342

## DEVISEE.

See DEBTOR AND CREDITOR.  
CHARGE.  
COSTS.

## ELEGIT.

See DEBTOR AND CREDITOR, 5.

## ENROLLING DECREE.

See APPENDIX, p. xvi.

## ESTATE TAIL.

See DEVISE, 2.

## EVIDENCE.

See APPENDIX, pp. xvii., xviii., xix., xx., xlv., xlv., xlvii., xlviii.  
DESCRIPTION.

## EXCEPTIONS.

See APPENDIX, pp. xx., l.

## EXECUTORS.

See ADMINISTRATION SUIT.

1. By an assignment, by one of several executors, of a leasehold estate, the property of the testatrix, which had been bequeathed to that executor absolutely for his benefit, reciting that the assignor and another executor had proved the will, (but not stating the fact that a third executor had also subsequently proved), and reciting that the executors had assented to the bequest to the assignor, it was witnessed, that the assignor, in his several capacities of executor and assignee of the testatrix, in consideration of the sum therein mentioned, sold and assigned the premises to the purchaser. The

assignor, in his character of executor, was, at the time of the assignment, indebted to the estate of the testatrix in a sum greater than the value of the property assigned. On a bill by the co-executors, on behalf of the estate of the testatrix, to set aside the assignment, and recover the title deeds, it was *held*, that the assignment by the executor to the purchaser was effectual, and that, whether there had or had not been an assent to the bequest by the other executors, the Court would not disturb the sale. *Cole v. Miles*,

179

2. Whether, without any express assent by executors to a bequest of a leasehold estate, the entering of the legatee into possession and receipt of the rents and profits, with the knowledge of and without any objection from the executors, does not amount to an assent by them—*Quere*.

*Ib.*

3. A testatrix bequeathed a leasehold to trustees and executors, in trust for sale, and gave one of such executors a beneficial interest for his life in one-fourth part of the estate. The latter executor, being at the time indebted to the estate of the testatrix, made an assignment of his beneficial interest by way of mortgage, to secure a private debt which he owed to a creditor, and deposited the title deeds with the creditor:—*Held*, on a bill by his co-executors, to recover the title deeds, that the estate of the testatrix was entitled to a lien on the interest of the defaulting executor in the premises comprised in the deeds, in priority to the lien created by his assignment to the mortgagee; and the Court decreed the title deeds to be delivered up, with a declaration that they belonged to the three trustees. *Cole v. Muddle*,

186

## FACTOR.

See PRINCIPAL AND AGENT.

## FAILURE OF ISSUE.

1. Estates settled on the husband for his life, with remainder to his sons successively in tail, remainder to the husband in fee, were devised by the husband, *in case he should die without having any issue* by his wife, to his wife for her life, remainder to his brother for his life, with remainder in trust for sale, with a direction to pay 4000*l.* out of the proceeds, rents, and profits, to the eldest daughter of the brother, to be a vested interest on her attaining twenty-one or day of marriage:—*Held*, that, upon the true construction of the will, the ulterior limitation depended on the failure of issue at the death of the testator, and not on the general failure of issue; and that the daughter was entitled to the 4000*l.* *In the Matter of Rye's Settlement*,

106

2. Where the ulterior limitations in a will are made to depend upon a failure of issue of the testator, and there are found amongst the ulterior limitations provisions which could not reasonably be meant to depend upon a general failure of issue, the will is to be construed as referring to a failure of issue at the death, and not to a general failure of issue.

*Ib.*

3. The fixing of the time of the death of living persons as the period of disposition, considered as inconsistent with the notion that the legacy was to take effect only on general failure of issue.

*Ib.*

## FEE SIMPLE.

See DEVISE, 2.

## FINE.

See LESSOR AND LESSEE.

## HUSBAND AND WIFE.

### FORECLOSURE.

See APPENDIX, l., li.

### FOREIGN LAW.

See MORTGAGOR AND MORTGAGEE.

### FORMA PAUPERIS.

See APPENDIX, p. lii.

### FRAUD.

See DEBTOR AND CREDITOR, 5.

### GUARDIAN AD LITEM.

See APPENDIX, pp. xxiv., lii., lxvii.

### GUYANA.

See MORTGAGOR AND MORTGAGEE.

### HALF BLOOD.

See NEPHEW.

### HEIR-AT-LAW.

See CHARGE, 3.

DEBTOR AND CREDITOR, 15.

### HUSBAND AND WIFE.

See CONSIDERATION, 1.

CONSTRUCTION, 2.

COPYHOLD, 3.

JOINT TENANCY.

1. A married woman, whose husband did not maintain her, *held* not to be entitled, as against a particular assignee of the husband, to maintenance out of the income of the real and personal estate to which she was entitled in equity for her life. *Tidd v. Lister*; *Bassil v. Lister*, 140

2. As against purchasers for value from the husband, of the life-interest of the wife, equity will follow the law, which gives to the husband the power of dealing with the income of his wife's property, and will not put in force the rule that he who comes into equity must do equity, whereby

purchasers would be involved in inquiries into the relations between husband and wife, their property, means of maintenance.

3. Distinction between the case in which a wife takes an absolute interest in her property, and that in which she takes a life-interest, and between cases of an assignment by the husband of the wife's property to his general assignee on bankruptcy or insolvency, and of assignment to a particular assignee for value.

4. Monies coming to the hands of the receiver in a cause in which husband and wife are parties, may be considered as not reduced to possession by the husband; where the husband has created encumbrances on the property in which he became interested in right of wife, and the Court has ordered monies to be applied in favour of incumbrancers, the effect is to discharge the title, and reduce into possession the monies which were the subject of the order.

5. Settlement of the whole or share of a married woman in the estate of an intestate upon the married woman and her children, with a proviso, that, if there should be no children, and the husband should survive the wife, the assignees of the husband should take the fund, in case being one in which the husband being an uncertificated bankrupt had married an infant, and afterwards abandoned her. *Gent v. Gent*, 100

6. By a marriage settlement an estate was conveyed to trustees on trust to pay the rents and profits to the intended wife during her life for her separate use, but the settlement was also for the benefit of her children and also for the support, maintenance, and education of the children of the marriage; and, after the

his shares shewing that they were then nearly valueless, and the further fact, that, in the following month, the Banking Company suspended its payments, afforded sufficient *prima facie* evidence that the board were justified in not purchasing or permitting the transfer of the shares, to induce the Court to refuse to stay the action for calls until the hearing of the cause, except upon the terms of bringing the amount into Court. *Taft v. Harrison*, 489

3. *Held*, also, that the question, whether the board were justified by the facts of the case in refusing either to permit the transfer of the shares or to purchase them for the Company, was a question to be tried in equity. *Id.*

4. A landowner, being a peer of Parliament, entered into an agreement with the projectors of a railway, stipulating, among other things, that they should take certain portions of his land, and pay him certain specified sums for the same and by way of compensation for permanent injury to his mansion and estate; that they should execute certain works of utility and ornament on his property, and make and maintain a station adjoining or near to a particular road, at which all trains passing along the railway should stop for the accommodation of passengers, and for the receiving and unloading of goods, luggage, carriages, and horses; with a provision that the landowner should withdraw his opposition to the bill of the projectors, and co-operate with them and use his best endeavours to prevent the bill of a rival Company from passing into a law; but that, if the bill of the rival Company should pass, then the first-mentioned Company should pay the Plaintiff certain sums for the land the rival Company might take, and recover

from the latter and pay to the first-mentioned Company the largest amount of price and compensation which could be obtained; and a provision that either of the parties might determine the agreement by notice to the other if the bill of the first-mentioned Company should not pass within six months; and a further provision, that, if the two projected Companies should be amalgamated, the amalgamated Company should pay certain sums to the Plaintiff as purchase money and compensation; and that the covenants and agreements concerning the purchase and taking of land, not making deviations without the Plaintiff's consent, and the making and maintaining such station, and all other the covenants and agreements thereinbefore contained on the part of the first-mentioned Company, so far as the same should be applicable, should be performed by the amalgamated Companies. By an Act, passed within six months, the subscribers to the two projected Companies were incorporated in one body, and authorised to make certain of the projected lines of railway; and it was enacted, that the shareholders of each Company should be entitled in certain rates or proportions to the shares of the united Company. It was held by the House of Lords, affirming the judgment of the Exchequer Chamber (which reversed that of the Court of Exchequer), that, notwithstanding the bill of the first-mentioned Company did not pass, the agreement could not be determined by a notice given by the projectors who were parties to the agreement, or by the amalgamated body. The amalgamated Company having then taken the land referred to in the agreement, and paid for it the price thereby stipulated, and having, in a suit in equity



brought against them by the landowner, claimed the benefit of the agreement, he filed his bill for a specific performance of his contract with the projectors of the first-mentioned Company, and moved for an injunction to restrain the incorporated Company from permitting any of their trains to pass a certain station near the road mentioned in the agreement without stopping thereat for the accommodation of passengers, &c.:—*Held*, that the union and incorporation of the shareholders of the two Companies in one body, and the consolidation of their several shares under the Act of Parliament, constituted an amalgamation within the meaning of the agreement. *The Earl of Lindsey v. The Great Northern R. Co.*, 664

5. That the amalgamated Company was bound by the agreement entered into with the Plaintiff by the projectors of the first-mentioned Company. *Ib.*

6. That there was no objection to the agreement in point of legality, with reference to the position of the Plaintiff as a member of the legislature; and that, especially after the agreement had been the subject of consideration and construction in the House of Lords and in the Court of Queen's Bench, this Court would not refuse to enforce it on any suggestion of illegality. *Ib.*

7. That the Plaintiff was therefore entitled to the injunction, and, under the circumstances of the case, upon the interlocutory application, —before the hearing of the cause. *Ib.*

## JOINT TENANCY.

A woman, joint tenant of a reversionary interest in a legacy of 2000*l.* stock, married; and, after the marriage, the husband became bankrupt,

and then the wife died, leaving the tenant for life of the fund surviving:—*Held*, that, by the death of the wife, the other joint tenants of the fund became entitled to her interest therein by survivorship; that that was the elder title to that of the husband, which also accrued after the death of the wife; and that, upon the death of the tenant for life, the other joint tenants, and not the assignees of the husband, were entitled to what had been the wife's share of the fund. *In the Matter of Newton Barton*, 12

## JUDGMENT CREDITOR.

*See* DEBTOR AND CREDITOR, 5, 6.

## JURISDICTION.

*See* DEBTOR AND CREDITOR, 6.

1. In a suit to carry into effect an agreement by giving the Plaintiffs relief in respect of a breach of the agreement by the Defendants, and, at the same time, on the ground of such breach, to remove them from an office of trust and confidence which they held by virtue of the agreement, and to appoint other persons to such office; the Court, considering the Plaintiffs entitled on an interlocutory application to the relief sought, restrained the Defendants, by interlocutory order in a supplemental suit, from prosecuting actions at law against the Plaintiffs under the agreement to recover damages for removing the Defendants from such office. *Brenan v. Preston*, 325

2. In a question on the effect of a contract in the circumstances of the case, where the Court had concurrent jurisdiction with a Court of law, and had assumed such jurisdiction by interfering to protect the rights of the parties, the Court restrained the parties to the contract from bringing

actions at law founded on the facts with regard to which the Court had interfered, and in which actions the same question, of the legal effect of the agreement, in the circumstances, would necessarily arise. *Ib.*

3. A case in which the Court on an interlocutory application appointed a ship's husband at the suit of some of the part owners of a ship as against the others, who were, under a contract, ship's husbands as well as part owners. *Ib.*

### LEGACY.

*See CONSTRUCTION, 3, 4, 5.*

1. The testator bequeathed his residuary estate to trustees, upon trust to pay the interest thereof, after the decease of a tenant for life, to *John, Robert, and Ann*, for five years, and at the expiration of that term to pay them 5000*l.* a-piece, and then to pay the interest of the remainder for a further term of three years to *John, Robert, and Ann*, in equal shares; and at the expiration of that time, to pay the whole to *John, Robert, and Ann*, in equal shares. Soon after the death of the tenant for life, and before the expiration of the five years, *John* and *Robert* claimed and obtained from the trustees payment of the whole of their two-thirds of the residuary estate of the testator; but it was held, that the husband of *Ann* was not entitled to immediate payment of her share of the capital, and that he was unable to give an effectual release or discharge for the same. *Harley v. Harley*, 325

2. The testator gave all his household furniture, linen, wearing apparel, books, plate, wines, fixtures, statues, china, horses, carriages, and everything in his house, to trustees, of whom his wife was one, and directed that all his household property "as

aforesaid" should, after his decease, be sold, "with the exception of such articles, whatever they be, that my dear wife may desire to retain for her own use; which I hereby empower her to appropriate to her own use:"—*Held*, that this bequest did not enable the widow to take the whole of the household property, but intimated a confidence that she would not take the whole; that she was empowered to make her selection as well from amongst the statues, pictures, and ornamental articles as from the ordinary furniture; and that she was entitled absolutely to the articles which she might select. *Kennedy v. Kennedy*, 438

3. A bequest of residuary estate to be invested in Consols, and to be held by the executors in trust for all and every the grandchildren of the testator, to be divided equally amongst them at the expiration of twenty years after his decease, held to confer immediate vested and transmissible interests to the grandchildren living at the death of the testator, subject to be opened and let in grandchildren who might be born before the expiration of the twenty years. *Oppenheim v. Henry*, 441

4. In a bequest of 1000*l.* to certain persons for life, and (after their decease) of 400*l.* part thereof to *A.* and *B.*, part and part alike, viz. 200*l.* to *A.* and 200*l.* to *B.*, for the trouble they might have in the execution of the will, "but in case of either of their death," to the survivor; "and in case of both their deaths, to the heirs, executors, and administrators of such survivor 200*l.* only." The words "in case of death" were held to refer to death in the lifetime of the tenant for life of the 1000*l.* *Green v. Barrow*, 459

5. The testator bequeathed 5000*l.* to his wife for life, and after her decease to his nephew absolutely; but

## LEGATEE.

if the nephew should die in the lifetime of the wife, then he directed his executors to divide the same amongst the children of the nephew; and in case the nephew should die without leaving lawful issue, then to pay the same unto and equally between his two nieces, Louisa and Georgiana, for their separate use; and in case one or both of the nieces should die in the lifetime of the wife, then to pay and divide the share of the niece so dying unto and equally between her children as tenants in common; and the testator bequeathed all monies in the public funds of which he should die possessed, upon trust for his wife for her life, and after her death for the benefit of his nieces, Louisa and Georgiana, *in manner thereinbefore directed of and concerning the sum of 5000*l.**; and he gave all the residue, except monies in the funds, to his wife absolutely. One of the nieces died in the lifetime of the wife, leaving children:—*Held*, that the gift of the 5000*l.* to the children of the nieces could not be regarded as a part or modification of the gift to the mother, but was in fact a substitutionary gift to arise on a distinct event;—that the reference to the bequest of the 5000*l.* in the residuary gift of the monies in the funds, by the words “in manner hereinbefore directed,” might refer to the manner of taking as tenants in common, or for their separate use;—that the children of the niece did not, therefore, by virtue of the reference, take any interest in the residue of the monies in the funds; and that, as to such monies, so far as related to the share of the deceased niece, there was an intestacy. *Lumley v. Robbins*, 621

## LEGATEE.

See DEBTOR AND CREDITOR, 17.

DESCRIPTION.

MALE LINE.

## MALE LINE

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## LEGATEE'S SUIT.

See APPENDIX, p. xxiv.  
COSTS.

## LESSOR AND LESSEE.

See VENDOR AND PURCHASER, 1.

The Bishop of *Winchester*, the lessor of lands of the see, demised for lives and years:—*held* not to be entitled to any portion of the purchase money, and compensation for damage and severance, paid into Court in respect of lands comprised in the demise, and taken by a Railway Company, or to the dividends of such money when invested, on the ground of the diminution of the fine which would be payable,—until the lease should become renewable. *Ex parte The Bishop of Winchester*, 137

## LIEN.

See PRINCIPAL AND AGENT.

## LIFE INTEREST.

See HUSBAND AND WIFE, 3.

## LUNACY.

Investment of a fund belonging to a lunatic in an annuity for his life. *In re Dodsworth's Trust*, 16

## MALE LINE.

1. A bequest of the interest of a sum in Consols to such of the two brothers and six sisters of the testator as should be living on the day each dividend became due; and, after the death of the last survivor of the brothers and sisters, to such of their children, the nephews and nieces of the testator, as should be living when the dividends became

due; and a direction that the residuary estate should accumulate for twenty-one years after the testator's death, and then the whole to the testator's then nearest of kin in the male line in preference to the female line, upon condition that the inheritor should assume the testator's surname if not of that name, and bear his arms with due differences; and, in default thereof, to the next in lawful succession, and successively to the heir or successor who should comply with those conditions. The testator died a bachelor:—*Held*, that the words, the "then nearest of kin in the male line in preference to the female line," should not be read as meaning the nearest of kin being a male or males exclusive of females, unless a distinct intention of excluding females were otherwise found in the will; and that no such intention in this case appeared, but, on the contrary, the use of words not indicative of sex, and the provision for taking the surname of the testator, rather indicated the absence of any such intention. *Boys v. Bradley*, 389

2. That the words "in the male line in preference to the female line," should not be read as in a parenthesis, so as to give merely a preference to the male line, but must be understood as confining the gift to the male line, and excluding the female line. *Ib.*

3. That it was not necessary that the person to take the residuary estate under the bequest should derive his title continuously through a line of males, passing by all females; and that the expression "in the male line," was not equivalent to the expression "in a line of males." *Ib.*

4. That the time of ascertaining the course of descent designated by

the words of the bequest was at the death of the testator; and that the bequest did not contemplate a descent from the brothers of the testator in preference to a descent from his sisters; but that it contemplated a descent from his father, and not a descent from his mother; and that the limitation to the nearest of kin in the male line in preference to the female line should be construed as a gift to the nearest of kin *ex parte paterna*. *Ib.*

5. That a sister of the testator, who alone of his sisters and brothers survived the twenty-one years, was the nearest of kin within the description, and entitled to the residuary estate; and this, notwithstanding the same sister was also entitled to the interest of the sum of Consols set apart for the brothers, sisters, nephews, and nieces. *Ib.*

### MARSHALLING.

*See* DEBTOR AND CREDITOR, 16.

One party having a charge on freehold and copyhold estate, and another party on the freehold estate only, it was *held* that the latter was entitled to require that the former should be satisfied out of the copyhold estate, so far as it would extend. *Tidd v. Lister*, *Bassil v. Lister*, 157

### MERGER.

Where the tenant in fee or in tail of an estate becomes entitled to a charge upon the same estate, the general rule is, that the charge merges, unless it be kept alive by the party entitled to it; and where the merger of the charge would have let in other charges in priority, thereby rendering it the interest of the owner of the estate to keep alive his charge, the Court presumed that such was

## NEPHEW.

his intention, notwithstanding the absence of any other indication of such intention. *Grice v. Shaw*, 76

## MORTGAGOR AND MORTGAGEE.

See APPENDIX, p. xl.

No right in land situated in the colony of British Guiana is acquired except by a transport or conveyance in Court in the form of a judicial act; and, therefore, an assignment executed in this country of the benefit of a contract for the purchase of land in the colony, as a security for monies lent to the purchaser, to enable him to complete the purchase, confers no right, estate, interest, lien, or charge upon such land; and such land, whether it be or be not actually conveyed to the purchaser in the form required by the law of the colony, by the payment of the purchase-money becomes subject to the claims of the creditors of the purchaser generally, without the necessity of such creditor first proceeding to judgment and execution; and a transport or conveyance cannot, without notice, be made to any party other than the purchaser, thereby affording an opportunity for the general creditors of the purchaser to interpose. *Waterhouse v. Stanfield*, 254

## MOTION.

See APPENDIX, p. xxiv.

## MOTION FOR DECREE.

See APPENDIX, pp. xxiv., liv., lv.

## MULTIFARIOUSNESS.

See APPENDIX, p. lvi.

## NEPHEW.

The description of nephews and nieces includes the child of a brother

## PARTNERSHIP. 727

or sister of the half blood. *Grievs v. Rawley*, 63

## NEXT OF KIN.

See MALE LINE.

## NIECE.

See NEPHEW.

## NE EXEAT REGNO.

See APPENDIX, p. ii.

## NOTICE OF DECREE.

See APPENDIX, p. xxvii.

## PARTIAL EXECUTION OF A TRUST.

See APPENDIX, p. xxii.

## PARTIES.

See APPENDIX, pp. xxix., lviii.

## PARTNERSHIP.

See RAILWAY COMPANY, 4.

1. A tradesman bequeathed his residuary estate, including his stock in trade, to trustees, with a direction to convert into money all such parts as should not consist of leaseholds or money in the funds; and to invest the same and pay the annual income to *Sarah* his wife; and after her decease, to *Mary*, his wife's sister; and after the decease of the survivor of *Sarah* and *Mary*, he gave his residuary estate to another person absolutely. After the date of the will *Mary* married, and her husband and the testator entered into partnership, under articles, which contained a proviso, that if the testator should die during the partnership, leaving a widow surviving, such widow might, if she should think fit, continue to carry on the partnership business with the surviving partner, and should be entitled to the testator's share in the profits and

excess of capital; and if the testator should leave no widow, or his widow should not desire to enter into the business, or if the other partner should die during the partnership, the surviving partner to take upon himself the partnership business and property, accounting and paying for the same as therein directed. The testator died, leaving his widow, who, under this provision, claimed his interest in the partnership:—*Held*, that the provision in the articles took the testator's share of the business wholly out of the provisions of the will, and that the widow became entitled under the partnership articles to such share. *Page v. Cox*, 163

2. A trust may well be created in the absence of any expression importing confidence; and the obligation on the surviving partner created by the partnership articles, with reference to the legal interest in the partnership, did not in substance differ from a trust, and therefore the articles of partnership created a trust in favour of the wife, to arise on the death of the testator leaving a widow surviving, which would attach on the property as it should then exist. *Id.*

3. *A.* and *B.*, who were partners in the business of sharebrokers, and also bought and sold shares on their own account, dissolved their partnership, and after the dissolution *A.* deposited with the bankers of the firm shares which the firm had contracted to buy but had not paid for, and obtained advances to pay for such shares upon the security created by the deposit, and signed an authority to the bankers, in the name of the firm, to sell the shares, if the monies advanced were not repaid in a certain time. In a suit brought by *B.* against *A.* and the bankers, repudiating the authority of *A.* to make the deposit, obtain the ad-

vances, or authorise the sale:—*Held*, that, under the circumstances, *A.* had power, notwithstanding the dissolution, to raise money for the purpose of completing the purchase of the shares by means of the deposit, and to give the bankers authority to sell the shares in default of repayment. *Butchart v. Dresser*, 453

4. Articles of partnership provided, that it should be lawful for the holders of two-thirds or more of the partnership shares for the time being to expel any partner, by giving him notice thereof under their hands in the form thereby prescribed; and that immediately after giving such notice a notice of the dissolution as to the expelled partner should be signed by the partners and published, with power to any other of the expelling partners to sign the name of the expelled partner; and it was provided, that, if a partner became bankrupt, insolvent, or was expelled, his interest should cease, as to profit and loss, as if he had died on the day of such bankruptcy, insolvency, or expulsion; and that the amount of his share should be ascertained and payment secured by the same arrangement as would have been applicable in case of his decease; and it was also provided, that the shares of retired, deceased, bankrupt, insolvent, or expelled partners should be disposed of in such way, either to or between some or all of the continuing partners, or by the admission of a new partner or partners, as the holders of a majority of shares should determine. The articles provided, that, in the case of making certain arrangements, there should previously be a meeting of the partners in committee, but did not express that any such meeting should be necessary previous to the exercise of the power to expel. The article also provided for the adjustment of the partner's accounts within

sixty days after the 30th of June in each year, when an inventory of all the stock, debts, &c., should be made, with proper allowances, so as to ascertain the partnership property, profit and loss, and the shares of the respective partners, which shares were to be carried to their respective accounts; and it was provided, that the share of any partner who might wish to retire, if his retirement were consented to by the majority of the others, was to be taken by the continuing partners at the amount at which the same stood at the time for making the yearly rest or settlement next preceding; and that the surviving partners were also to take the shares of a deceased partner at the amount at which the same stood at such next preceding yearly rest or settlement:—*Held*, that the power of expulsion of a partner might be exercised by two-thirds of the partners without any previous meeting of the partners in committee upon the question, and without any cause being assigned for such expulsion; but that the power must be exercised with good faith, and not against the truth and honour of the contract. *Blisset v. Daniel*,

493

5. That such a power must be understood to exist, not for the benefit of any particular parties holding two-thirds or more of the shares, but for the benefit of the whole society or partnership. *Id.*

6. That it could not be exercised merely to enable the continuing partners to appropriate to themselves the share of the expelled partner at a fixed value less than the true value. *Id.*

7. That the power was not properly exercised at the exclusive instance of one partner, and in consequence of his representation to the other partners, made without the

knowledge and behind the back of the partner who was to be expelled, and without giving to such partner the opportunity of stating his case, and of removing any misunderstanding on the part of his co-partners. *Id.*

## PAYMENT INTO COURT.

See APPENDIX, pp. xxx., lxiii.

## PAYMENT OUT OF COURT.

See APPENDIX, pp. xxx., lxiv.

## PEDIGREE.

See NEPHEW.

## PEER OF PARLIAMENT.

See JOINT STOCK COMPANY, 6.

## PERSONAL REPRESENTATIVE.

See CHARGE, 2.

## PETITION.

See APPENDIX, pp. lxx., lxvi.

## PLEADING.

See ADMINISTRATION SUIT.

APPENDIX, p. lvi.

1. A bill by a legatee, claiming under the will of another legatee, who took under the will of the original testator, bringing forward various claims against the representatives of the original testator, and the representatives of the first and second legatee, may be multifarious, although all the claims are in some manner derived from, or connected with, the estate of the original testator. *Cowman v. Harrison*, 234

2. The Court will not refuse relief to a Plaintiff, merely on the ground

that he has superadded to the circumstances of the case which would entitle him to relief, allegations of fraud which are not established. *Espey v. Lake*, 260

## POWER.

1. Bequest of the testator's property to his wife to bring up and educate his children, and, when they should come of age, to settle on them what she should deem prudent, reserving to herself a sufficient maintenance; and, at her death, the property remaining to be equally divided amongst his children; with a gift to trustees for the children, in case of the marriage of his widow:—*Held*, that the widow took a life-interest in the property, with a power to settle or appoint the same on or to the children of the testator, but not on or to his grandchildren; and that the children took vested interests in the property at the testator's death, liable to be divested by such appointment. *Kennerley v. Kennerley*, 160

2. A devise of real and personal estate to trustees, with a direction for sale with all convenient speed and within five years, and to apply the proceeds in payment of debts and legacies, and invest the residue upon trusts for the widow and children of the testator:—*Held* to empower the trustees to sell after the five years had elapsed. *Pearce v. Gardner*, 287

## PRECATORY GIFT.

See ABSOLUTE INTEREST.

## PRINCIPAL AND AGENT.

1. Under an agreement between a shipper of goods and a factor, through whom the goods were sold in a foreign country, the factor gave

his acceptances to the shipper for a proportionate part of the value of the goods, for the payment of which acceptances, if not satisfied by the proceeds of the goods, the shipper was to provide:—*Held*, that, on his failure to do so, and on the payment of the acceptances by the factor, the shipper of the goods became debtor in account to the factor for the amount paid by the latter; and that the remedy of the factor was not merely in damages. *Graham v. Ackroyd*, 192

2. Where a factor makes advances, he has a personal remedy against the principal as well as a lien on the fund; and this is the same whether the factor has or has not a *del credere* commission, except that, when the factor, having a *del credere* commission, has sold the goods, he cannot sue the principal for advances which are covered by the price of the goods, that price being warranted to the principal by the guarantee arising out of the commission. *Id.*

## PRINCIPAL AND SURETY.

The contract of suretyship entitles the surety to require that his position shall not be altered by any arrangement between the creditor and the principal debtor, from that in which he stood at the time of the contract; and it, therefore, entitles him absolutely to the benefit of all the securities for the debt which the creditor held at the time of the contract; it also entitles the surety, at any time, to require that the creditor shall enforce against the principal debtor not only all his remedies, and all the securities for the debt which he has at the time of the contract, but also any securities for the debt which the creditor may have acquired subsequently to the contract, and which he holds at the time that



## PURCHASE DEED.

the surety requires him to proceed. And as a person paying off a debt for which he is liable, is entitled, in equity, to stand in the place of the creditor, and to have the benefit of the securities held by the creditor for such debt; so the surety, on paying off the debt of the principal debtor, is entitled to require from the creditor the benefit, not only of the securities for the debt which the creditor had at the time of the contract of suretyship, but also of all the securities which he holds at the time he is paid off. But there is no implied duty in the contract of suretyship, which requires the creditor to retain, for the benefit of the surety, securities for the debt which he might subsequently receive from the principal debtor, and which, whilst the creditor holds them, the surety does not call upon him to enforce. And a creditor, who, after the contract of suretyship, having taken a further security from the principal debtor, subsequently parts with that security, does not thereby, either wholly or pro tanto, release the surety. *Newton v. Chorlton*,

646

## PROCEEDINGS IN CHAMBERS.

*See* APPENDIX, p. lxvi.

## PRO CONFESSO.

*See* APPENDIX, p. lvii.

## PRODUCTION OF DOCUMENTS.

*See* APPENDIX, p. xxxi.

## PURCHASE-DEED.

*See* APPENDIX, p. lxx.

## RAILWAY COMPANY. 731

### RAILWAY COMPANY.

*See* TOLLS.

1. The object of the 87th section of the Railways Clauses Consolidation Act, (8 Vict. c. 20), is to enable one Railway Company to contract for the passing of their trains to the limits of the railway of another Company, with the incidents which ordinarily attach to such power of passing, including that of stopping at the stations on the line, and carrying passengers and goods to and from such stations. But it does not enable one Railway Company, under colour of passing over the line of another Company, to carry the whole of the traffic of the other railway over which they may agree to pass. *Simpson v. Denison*,

51

2. An agreement by one Railway Company for the payment to another of such an amount as will, after answering all expenses and liabilities, furnish a certain dividend on the paid-up capital of such other Company, is not an agreement for the payment of a toll within the meaning of the 87th section of the Railways Clauses Consolidation Act.

*Ib.*

3. It is not lawful to apply the funds of a Company in an application to Parliament for powers to extend the business of the Company beyond the objects for which it was constituted; and the Court will interfere, by injunction, at the suit of a shareholder, to restrain any such application. *Ib.*

4. The same principles which regulate the rights of parties in ordinary partnerships, are applicable in determining the duties of the managing bodies in Joint-stock Companies as between them and members of such Companies. *Ib.*

5. The Court will enforce by injunction the provision of the 115th section of the Railways Clauses Con-

## 732 RAILWAY COMPANY.

solidation Act (8 & 9 Vict. c. 20), that no engine or other description of moving power shall be brought or used upon a railway, unless the same shall have been approved by the Railway Company as therein mentioned, notwithstanding the practice of Railway Companies has been to rely on each other with respect to the fitness of their respective engines, and not to enforce the provision of the Act; and notwithstanding also, that, to enforce such right of inspection, would occasion great inconvenience to the public traffic, and although it may appear that the provision is sought to be enforced, not from any apprehension of the use of improper engines, but for the purpose of impeding the traffic over their line of a competing Company. *The Midland Railway Company v. The Ambergate, Nottingham, and Boston and Eastern Junction Railway Company*, 359

6. Although the expression "the railway" is, by the interpretation clause of the Railways Clauses Consolidation Act (s. 3), defined to mean "the railway and the works by the special Act authorised to be constructed," and these have been construed to include a station, yet it is very doubtful whether the power reserved to the public by the Railways Clauses Consolidation Act (s. 92), to use "the railway" with engines and carriages, upon payment of tolls which are calculated at a certain rate per mile, includes the power of using also the stations of the Company. *Ib.*

7. An interpretation clause in an Act of Parliament should be understood to define the meaning of the word thereby interpreted in cases as to which there is nothing else in the Act opposed to or inconsistent with that interpretation. *Ib.*

8. The Court refused to restrain one Railway Company from using the

## RENT CHARGE

station of another, under an agreement, which was made between the two Companies, before a connection had been established between the Company using the station and a third Company, which brought such third Company into competition with the Company to whom the station belonged—it not being clear that the right of the Defendants to use the station was not intended to be given by their special Act—the agreement being open to the construction that the extent and terms of the station accommodation were from time to time to form the subject of reference to arbitration, and there being no award specifying the time at which it should determine; the rival or competing Company having also been in existence at the time the agreement was made, and the Plaintiffs being therefore at that time aware of the possibility of the competition afterwards arising; and, supposing the question to be doubtful, the balance of convenience preponderating against granting the injunction. *Ib.*

## RECEIVER.

*See* APPENDIX, p. lxxi.

## REDUCTION INTO POSSESSION.

*See* HUSBAND AND WIFE, 4.

## REFERENTIAL GIFT.

*See* LEGACY, 5.

## RELEASES TO USES.

*See* VENDOR AND PURCHASER, 2.

## RENT CHARGE

*See* DEVISE, 3.

## SPECIFIC LEGACY.

### RESIDUARY LEGATEES.

*See* DEBTOR AND CREDITOR, 17.

### REVERSIONARY INTEREST.

*See* JOINT-TENANCY.

### REVIVOR AND SUPPLEMENT.

*See* APPENDIX, p. xxxi.

### REVOCATION.

*See* DEBTOR AND CREDITOR, 1, 3, 4.

### SALE.

*See* APPENDIX, pp. vii., lxxiv.

### SCHEME.

*See* APPENDIX, pp. xxxi., lxxiv.

### SECRET TRUST.

*See* TRUSTEE AND CESTUI QUE TRUST, 1.

### SEPARATION.

*See* HUSBAND AND WIFE, 6.

### SERVICE.

*See* APPENDIX, xxxi., lxxv.

### SHIP.

*See* JURISDICTION, 3.

### SHORT CAUSE.

*See* APPENDIX, p. lxxv.

### SPECIFIC LEGACY.

*See* CONVERSION, 3.

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## SPECIFIC PERFORMANCE. 733

### SPECIFIC PERFORMANCE.

*See* APPENDIX, p. lvi.

#### COSTS.

1. On a vendor's bill for specific performance, the opinion of the Court was much in favour of the title, the question on which turned on the construction of a particular will: but the Court, being unable to found that opinion upon any general rule of law, or upon reasoning so conclusive as to satisfy the Court that other competent persons might not entertain a different opinion, or that the purchaser taking the title might not be exposed to substantial and not merely idle litigation, refused to decree a specific performance. *Pyrke v. Waddingham*, 1

2. A doubtful title, which a purchaser will not be compelled to accept, is not only a title upon which the Court entertains doubts, but includes also a title which, although the Court has a favourable opinion of it, yet may reasonably and fairly be questioned in the opinion of other competent persons; for the Court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion in favour of the title should turn out not to be well founded. *Ib.*

3. If the doubts as to a title arise upon a question connected with the general law, the Court is to judge whether the general law on the point is or is not settled; and if it be not, or if the doubts as to the title may be affected by extrinsic circumstances, which neither the purchaser nor the Court can satisfactorily investigate, specific performance will be refused. *Ib.*

4. The rule rests upon the principle that every purchaser is entitled to require a marketable title. *Ib.*

5. It is the duty of the Court,

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on questions of title depending on the possibility of future rights arising, to consider the course which would be taken if the rights had actually arisen, and were in course of litigation. *Ib.*

6. A marketable title is a title which, at all times, and under all circumstances, may be forced upon an unwilling purchaser. *Pyrke v. Waddingham*, 8

7. The Court refused to enforce specific performance of an agreement for a mere tenancy from year to year. *Clayton v. Illingworth*, 451

8. The decision in the case of *Edwards v. The Grand Junction Railway Company* did not proceed on the principle that the incorporated Company was bound by the contract of a party acting as an agent for them prior to their corporate existence, but on the principle that the Court would not allow them to exercise powers acquired by means of such contract without carrying it into full effect; and, in the absence of any adoption of the contract of such a party by the incorporated Company, or of any attempt to exercise the powers thereby acquired, or of any part performance, the Court might refuse to enforce specific performance of such a contract against the incorporated Company; but if they adopt or avail themselves of the contract, or exercise the powers acquired by its means, the Court will, in that case, not only negatively but positively, interpose and compel the performance by them of every portion of the contract. *The Earl of Lindsey v. The Great Northern R. Co.*, 679

9. A Railway Company, having contracted with a party, who, under a contract made some years previously, was a purchaser of land which the Company required for the Railway, but who had not paid his

purchase-money, and appeared for some time to have abandoned the possession of the land, filed their bill for specific performance against both the vendor and purchaser:—*Held*, that, as the purchaser was not, after the lapse of time and under the circumstances, entitled in equity to a decree for the specific performance of the contract against the vendor, the bill must be dismissed as against him, with costs; and as against the purchaser, without costs. *South Eastern R. Co. v. Knott*, 122

10. The rights of parties to agreements to enforce a specific performance in equity are not co-extensive; for their respective rights depend upon their conduct, and the conduct of one may give him the right to apply to the Court, while the conduct of the other may debar him from that right. *Ib.*

## STATION.

*See* RAILWAY COMPANY, 6.

## STATUTES.

27 ELIZ. c. 4.

*See* CONSIDERATION, 5.

9 GEO. 2, c. 36.

*See* CHARITY, 1, 2, 3.

39 & 40 GEO. 3, c. 98—THELLUSSON ACT.

*See* ACCUMULATION.

1. Whether by the statute it is not meant to protect accumulations for portions to be paid out of the fund so accumulated, and not out of the whole fund,—*quære*. *Burt v. Sturt*, 424

2. The exception as to portions does not apply exclusively to portions created by antecedent instru-

## STATUTES.

ments. *Viscount Barrington v. Lid-  
dell*, 431

3. The conveyances, settlements,  
and devises, and the particular in-  
terests of the parents of children  
taking portions to which the statute  
refers. *S. C.* 432

4. The antecedent referred to by  
the word "such" conveyance, &c., in  
the 2nd section of the Thellusson  
Act. *S. C.* 434

5. A provision for payment of  
the debts of "other person or per-  
sons" held not to refer to the debts  
of *any* person or persons, but only  
of the person or persons directing  
the accumulation to be made. *Ib.*

6. The parent must take an in-  
terest in the real or personal estate  
the income of which is directed to  
be accumulated, to bring the case  
within the exception. *S. C.* 435

### SIR SAMUEL ROMILLY'S ACT

*See* APPENDIX, pp. xxxvii., xxxviii.

9 GEO. 4, c. 14; 3 & 4 WILL. 4, c. 27  
—(STATUTES OF LIMITATIONS).

*See* DEBTOR AND CREDITOR, 8, 10,  
12, 14, 16.

5 & 6 WILL. 4, c. 76—(MUNICIPAL  
CORPORATION ACT).

*See* APPENDIX, p. iii.

7 WILL. 4 & 1 VICT. c. 26—STATUTE  
OF WILLS.

*See* DEVISE, 3.

The provisions in the Wills Act  
against the lapse of legacies given to  
children, renders it necessary for a  
testator, intending that a legacy to  
one child shall go over to another in  
the event of the death of the first  
legatee, to express that meaning by  
his will. *In re Mores' Trust*, 178

## TENANT IN FEE. 735

1 & 2 VICT. c. 110, s. 13.

*See* DEBTOR AND CREDITOR.

8 VICT. c. 20, ss. 3, 87, 92, 115—  
(RAILWAYS CLAUSES CONSOLIDA-  
TION ACT).

*See* RAILWAY COMPANY, 1, 2.

14 & 15 VICT. c. 99, s. 14.

*See* APPENDIX, p. xix.  
EVIDENCE.

15 & 16 VICT. c. 86.

*See* APPENDIX, pp. xii., xiii., xiv.,  
xx., lxxiii.

### STEWARD.

*See* COPYHOLD.

### SUBSTITUTIONAL GIFT.

*See* LEGACY, 5.

### SURETY.

*See* PRINCIPAL AND SURETY.

### SURVIVORSHIP.

*See* CONSTRUCTION, 4.  
JOINT TENANCY.

### TAXATION.

*See* APPENDIX, p. lxxv.

### TENANT FOR LIFE AND REMAINDERMAN.

1. Estates were settled to the use  
of trustees upon such trusts as *A.* and  
*B.* should jointly appoint, and, sub-  
ject thereto, to the use of *A.* for life,  
with remainder to *B.* for life, re-  
mainder to the first and other sons  
of *B.* in tail, with a power in the  
trustees, with the consent of *A.* or  
the first person entitled to an estate  
of freehold in the premises, to agree

with any Railway &c. Company for the purchase-money and compensation in respect of any portion of the estate, and that their receipt should be a sufficient discharge; and to receive the monies to the same uses as the settled estates. A Railway Company gave notice of taking a portion of the lands under their powers, and a negotiation took place as to the price: the Company, requiring immediate possession, deposited 8000*l.* in a bank as security for and until payment of the sum which should be awarded or agreed upon. The Company subsequently gave a further notice to take another portion of the same estates; and a sum of money was paid by the Company to *A.* and *B.* upon their joint receipt, in which it was expressed to be paid on account of the compensation money to be ultimately fixed, and to be paid by the Company in respect of the said estates. Before the amount of the price and compensation was fixed, *A.* died. On a bill by *B.* as executor of *A.* against the trustees and the Company, to enforce the sale as upon a binding contract, and obtain payment of the purchase-money (*B.* waiving any claim thereto in his own right), the Court *held* that there was no contract for the sale of the lands to the Company, binding by its own force on the donee of the power, and that the remainderman could not be affected by the conduct of the donee of the power; and that, inasmuch as there was not, during the life of *A.*, any contract for the sale of such lands binding on *A.* and *B.*, independently of the possession by the Company, there was, therefore, no contract which could be enforced against the remainderman. *Morgan v. Milman*, 279

2. A testator bequeathed so much of his personal estate as when invested in stock would produce 125*l.*

a year, to trustees, upon trust to pay the dividends of such stock to *A.* for life, with a direction that the capital stock should, at *A.*'s death, fall into the residue of his (the testator's) estate; and a provision, that, if the stock should, before the trusts were fully performed, be paid off or reduced, by which any loss or deficiency might arise, the persons respectively interested therein should bear and sustain such loss or deficiency out of their respective interests, upon their becoming entitled thereto. The dividends on the stock were reduced during the life of *A.*—*Held*, that *A.* was not entitled to have the reduced dividends made up to 125*l.* a year by a sale of a portion of the capital of the stock. *Bague v. Dumergue*, 462

## TENANT IN FEE.

*See* MERGER.

## TENANT IN TAIL.

*See* MERGER.

## TITLE.

*See* SPECIFIC PERFORMANCE, 1, 2, 3, 4, 5, 6.

## TITLE DEEDS.

*See* EXECUTOR, 3.

VENDOR AND PURCHASER, 2.

## TOLLS.

*See* RAILWAY COMPANY, 2.

Tolls, within the meaning of the Railways Clauses Consolidation Act, should be fixed with reference to the number of carriages of one Railway Company which pass over the line of another Railway Company, under the terms of the agreement between

# TRUSTEE & CESTUI QUE TRUST. VENI

the two Railway Companies—*Sem-  
ble. Simpson v. Denison,* 60

## TRANSFER OF SHARES.

*See* JOINT STOCK COMPANY, 2.

## TRUSTEE AND CESTUI QUE TRUST.

*See* APPENDIX, p. xxii.

CHARITY, 2, 5.

DEBTOR AND CREDITOR, 3.

DEVISE, 1.

PARTNERSHIP, 2.

POWER.

REFERENTIAL GIFT.

VENDOR AND PURCHASER.

1. A devise and bequest of the testator's residuary estate to two persons, with an oral intimation given by the testator to one (if not both) of the devisees, that he had confidence in them, and was satisfied they would carry out his intentions, which they well knew, and an assent by one of the devisees to this intimation:—*Held* to be an undertaking by the devisee that he would carry out the intention, and to be therefore a gift upon a secret trust. And it appearing that the trust was for the foundation of a Socialist school, and either charitable or illegal, the Court declared it void as to the real estate, mortgages, and chattels real, and directed an inquiry into the nature of the trust contemplated. *Russell v. Jackson,* 204

2. Where it appeared that the gift was made upon the assent and consequent undertaking of one only of the devisees in trust to perform the illegal or void trust, the other devisee could not take the estate beneficially. *Ib.*

3. In such a case, if the extent of the property intended by the testator to be subjected to the secret trust be uncertain, it lies with the

trustee  
means  
design,  
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2. An agreement on the sale of an estate, that the title deeds should be delivered to the purchaser on the completion of the contract, but, as the deeds related also to other property belonging to the vendors, the purchasers should enter into, or procure to be entered into, one or more proper and sufficient covenant or covenants with the vendors for the production and delivery of copies of such deeds. The purchasers were trustees, and entered into the contract in pursuance of the directions in the will of their testator, for the investment of his personal estate in the purchase of lands, to be settled to certain uses creating estates for life, with remainder over in strict settlement. The estate was conveyed by the vendors to the purchasers to the uses declared by the will of their testator:—*Held*, that the agreement to enter into a proper and sufficient covenant for the production of the deeds, did not mean that the vendors should be entitled to a covenant which would secure to them their production at all times and under all circumstances; that the word 'sufficient' was connected with the word 'proper;' that the extent and sufficiency of the covenant must in a great degree depend on the mode in which the conveyance was taken; that releasees to uses do not stand in a worse position than trustees, who, according to the ordinary rule of the Court, are required to covenant for their own acts only: and that the Court would not compel the purchasers, who were only releasees to uses,—especially after the uses were executed by the statute,—to enter into such covenants. *Onslow v. Lord Londesborough*, 67

3. A Railway Company contracted with the owner of lands to pay interest for the purchase-money, and compensation to be awarded for so much of the lands as should be taken for the Railway; and it was agreed that the money should be deposited in a certain bank until the completion of the purchase, and that the interest should be paid to the owner up to and inclusive of the day on which the purchase should be completed:—*Held*, that the reasonable construction of this agreement was, that it referred to the completion of the purchase by the purchaser; that, on the part of the purchaser, the purchase was completed by the payment of the purchase-money into Court; and that it did not necessarily refer to the complete conveyance of the estate, and the final settlement of the purchase. *Lewis v. The South Wales Railway Company*, 113

## VESTED INTEREST.

See LEGACY, 3.

## VOID TRUST.

See CHARITY, 2.

TRUSTEE & CESTUI QUE TRUST, 2.

## WILL.

See APPENDIX, p. xxxii.

CONSTRUCTION, 1, 3.

PARTNERSHIP, 1.

POWER.

## WITNESS.

See APPENDIX, pp. xxxii., lxxvi.





















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